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No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P.L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, and SAM BENNETT,
Petitioners,

v.

BILL CLINTON, Governor of Arkansas, W.J. MCCUEN, Secretary of State of Arkansas, THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS, THE DEMOCRATIC PARTY OF ARKANSAS, THE DEMOCRATIC STATE COMMITTEE, and THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, prohibit the use of a runoff primary requirement in a county where blacks constitute 47 percent of the voting-age population but where:

- black candidates who win the initial primary are *always* defeated in the runoff primary by the white candidate who had originally finished behind them;
- black citizens were historically disenfranchised on account of race or color;
- blacks continue to suffer disproportionately from the legacy of past discrimination; and
- voting patterns are characterized by extreme racial bloc voting?

2. Did the courts below err in creating a *per se* rule

that section 2 of the Voting Rights Act as amended does not protect black voters if black citizens are a bare majority of the total population within the relevant jurisdiction, even when blacks are *not* a majority of the population of voting age?

3. Are State executive branch officials, who certify election results and otherwise administer state election laws, proper parties defendant in a challenge to those state laws under section 2 of the Voting Rights Act?

LIST OF PARTIES

The names of all the parties to the proceedings below appear in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

Introduction 3

Statement of Facts 7

1. *The runoff's interaction with racial bloc voting in Phillips County* 10

2. *The runoff's interaction with other social and historical conditions in Phillips County* 16

3. *The tenuousness of the policy underlying the use of runoff primaries* 21

Course of the Proceedings Below 25

Page

REASONS FOR GRANTING THE WRIT 29

I. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE THE LOWER COURTS WITH GUIDANCE ON HOW TO TREAT SECTION 2 CLAIMS CHALLENGING RUNOFF REQUIREMENTS 29

II. THE PER SE RULE THAT SECTION 2 DOES NOT PROTECT BLACK VOTERS IF BLACKS CONSTITUTE A MAJORITY OF THE POPULATION (BUT NOT A MAJORITY OF THE VOTING-AGE POPULATION) ANNOUNCED IN THIS CASE SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS 35

A. *This Court Has Rejected the Use of Per Se Rules in Section 2 Cases* . . . 36

B. *The Specific Per Se Rule Created in this Case Conflicts with this Court's Decisions in* White v. Regester *and* Rogers v. Lodge *and with Decisions of the Fifth and Eleventh Circuits* 39

III. THE HOLDING BELOW THAT THE GOVERNOR AND SECRETARY OF STATE ARE NOT PROPER DEFENDANTS TO A STATUTORY AND CONSTITUTIONAL CHALLENGE TO A GENERAL ELECTION RUNOFF STATUTE CONFLICTS WITH ALMOST THREE DECADES OF THIS COURT'S DECISIONS 42

CONCLUSION 49

TABLE OF AUTHORITIES

Page

Cases

Baker v. Carr, 369 U.S. 186 (1962) 44-45

Butterworth v. Smith, 110 S.Ct. 1376 (1990) 46-47

Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) . . 34

Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987) 48

City of Port Arthur v. United States, 459 U.S. 159 (1983) 31

City of Rome v. United States, 446 U.S. 156 (1980) 30-31

Eu v. San Francisco County Democratic Central Committee, 109 S.Ct. 1013 (1989) 47

Ex parte Young, 209 U.S. 123 (1908) . . . 46, 47

Fortson v. Dorsey, 379 U.S. 433 (1965) 45

Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex 1972) (three-judge court), *aff'd in relevant part and rev'd in part on other grounds sub nom White v. Regester*, 412 U.S. 755 (1973) 40

Page

Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978) 48

INS v. Chadha, 462 U.S. 919 (1983) 47

Jeffers v. Clinton, No. H-C-89-004 (E.D. Ark. May 16, 1990) (three-judge court) . . . 5, 22-23, 42

McMillan v. Escambia County, 748 F.2d 1037 (11th Cir. 1984) 48

Monroe v. City of Woodville, 819 F.2d 507 (5th Cir. 1987) 41

Perkins v. City of West Helena, 675 F.2d 201 (8th Cir), *aff'd*, 459 U.S. 801 (1982) 7, 21

Perkins v. Matthews, 400 U.S. 379 (1971) 20

Quinn v. Millsap, 109 S.Ct. 2324 (1989) 47

Reynolds v. Sims, 377 U.S. 533 (1964) 45

Rockefeller v. Matthews, 249 Ark. 341, 459 S.W.2d 110 (1970) 22

Rogers v. Lodge, 458 U.S. 613 (1982) . . . 40, 45

Smith v. Allwright, 321 U.S. 649 (1944) 23

Smith v. Clinton, 687 F. Supp. 1310 (E.D. Ark.) (three-judge court), *aff'd*, 109 S.Ct. 531 (1988) . . 8

Page

Thornburg v. Gingles, 478 U.S. 25 (1986) 4, *passim*

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) . . . 31

United States v. Dallas County Commission, 850 F.2d 1430 (11th Cir. 1988) 42

Wesberry v. Sanders, 376 U.S. 1 (1964) 45

Whitcomb v. Chavis, 403 U.S. 124 (1971) 45

White v. Regester, 412 U.S. 755 (1973) . . 40, 45

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam) 41

Statutes

28 U.S.C. § 1331 6

28 U.S.C. § 1343 6

28 U.S.C. § 2201 6

28 U.S.C. § 2202 6

Voting Rights Act of 1965 as amended, § 2, 42 U.S.C. § 1973 . . . . . 4, *passim*

Voting Rights Act of 1965 as amended, § 5, 42 U.S.C. § 1973c 19, 20, 32

42 U.S.C. § 1973j(f) 6

Ark. Stat. Ann. § 7-5-106 5

Ark. Stat. Ann. § 7-5-203 45

Ark. Stat. Ann. § 7-5-701 45

Ark. Stat. Ann. § 7-5-704 45

Ark. Stat. Ann. § 7-7-202 5

Other Materials

28 C.F.R. § 51 (appendix) 5

8th Cir. R. 16(a) 28

Isikoff, *U.S. Sues Georgia Over Voting Law: Widespread Effect Seen if Requirement for Runoffs is Overturned,* Wash. Post, Aug. 10, 1990, at A1, col. 1 4

McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South,* 17 Urb. Law. 429 (1985) 5

Page

S. Rep. No. 97-417 (1982) . . . . . 4, *passim*

U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (1981) 32

Voting Rights Act: Runoff Primaries and Registration Barriers: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong. 2d Sess. (1984) 30

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PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The opinion issued by the Court of Appeals sitting *en banc* is reported at 902 F.2d 15, and is contained in the

Appendix at page 1a. The opinion of the Court of Appeals panel is reported at 890 F.2d 1423, and is contained in the Appendix at page 3a. The memorandum opinion of the district court dismissing petitioners' challenge to the primary runoff statute is reported at 686 F. Supp. 1365, and is contained in the Appendix at page 58a. The order of the district court dismissing petitioners' challenge to the general election runoff statute and dismissing the Governor and Secretary of State as party defendants is unreported; it and relevant portions of the transcript of the district court's oral ruling are contained in the Appendix at page 132a.

JURISDICTION OF THIS COURT

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit upon rehearing *en banc*, summarily affirming, by an equally divided court, the decision of the United States District Court for the Eastern District of Arkansas, was issued on May 4, 1990.

On July 26, 1990, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari to and including August 31, 1990.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statutes, which are set out in the Appendix at page 171a:

- Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973
- Ark. Stat. Ann. § 7-5-106
- Ark. Stat. Ann. § 7-7-102
- Ark. Stat. Ann. § 7-7-202

STATEMENT OF THE CASE

Introduction

The Senate Report accompanying the 1982 amendments

to section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973--which this Court has described as an "authoritative" source for interpreting section 2, *Thornburg v. Gingles*, 478 U.S. 25, 43 n. 7 (1986)--expressly recognized that "majority vote requirements . . . may enhance the opportunity for discrimination against the minority." S. Rep. No. 97-417, p. 29 (1982) [hereafter referred to as "Senate Report"]. Earlier this month, in announcing that the United States has filed suit under section 2 to invalidate Georgia's primary runoff statute, Assistant Attorney General John Dunne, the head of the Civil Rights Division of the U.S. Department of Justice, described majority-vote requirements as "an electoral steroid for white candidates."[1]

In most states, a candidate wins an election or a party's nomination in a primary when he or she receives more votes than any of his or her opponents. Arkansas is one of ten

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[1]Isikoff, *U.S. Sues Georgia Over Voting Law: Widespread Effect Seen if Requirement for Runoffs is Overturned*, Wash. Post, Aug. 10, 1990, at A1, col. 1.

states, all of them in the South, and all of them with a long history of purposeful racial vote dilution, that do not follow this general rule.[2] Instead, under Arkansas law, a candidate must receive a majority of the vote cast in a primary election to obtain the nomination of a political party. Ark. Stat. Ann. § 7-7-202. If no candidate wins an outright majority of the votes cast in the first, or "preferential," primary than a second, "general," runoff primary is held between the top two vote getters two weeks later. Another statute, Ark. Stat. Ann. § 7-5-106, requires that a candidate for municipal or county office receive a majority of the vote cast to be declared the winner of a general election. Again, if no

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[2]The ten states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Oklahoma. *See* McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 Urb. Law. 429, 429 (1985). All of these states are subject, at least in part, to the preclearance requirements of the Voting Rights Act, 42 U.S.C. § 1973c, precisely because of their history of voting rights discrimination. *See* 28 C.F.R. § 51 appendix (1987) (listing states subject to preclearance requirements); *Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990) (three-judge court) (imposing partial preclearance requirement under section 3(c) of the Voting Rights Act on the state of Arkansas based on a finding of pervasive intentional discrimination in the adoption of general election runoff requirements).

candidate receives an outright majority, a runoff election between the top two vote getters is conducted two weeks after the general election.

This case challenges both of these runoff requirements as they operate in Phillips County, Arkansas. Petitioners are black registered voters in Phillips County. Their complaint alleged that the two runoff requirements interact with social and historical conditions to deny them an equal opportunity to participate in the political process and to elect the candidates of their choice to local and countywide office, in violation of section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. It further alleged that the runoff requirements had been adopted and maintained for the purpose of diluting black voting strength, in violation of section 2 and the Fourteenth and Fifteenth Amendments to the Constitution.[3]

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[3]The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201, and 2202; and 42 U.S.C. § 1973j(f).

Statement of Facts

Phillips County, Arkansas, is a rural, heavily black county on the Mississippi River. Although a bare majority of the county's total population is black, undisputed census figures show that only 47.00% of the residents of voting age are black. App. to Pet. for Cert. at 6a & n. 1.

Despite the large number of black residents, no black candidate has received the Democratic or Republican nomination for, or been elected to, any countywide office in Phillips County since the turn of the century. *See* App. to Pet. for Cert. at 6a; *id.* at 125a.

Historically, the primary reason for the lack of black electoral success was outright disenfranchisement through such devices as physical intimidation; discriminatory literacy tests; poll taxes; a white primary; and segregated polling places. *See* App. to Pet. for Cert. at 5a; *Perkins v. City of West Helena,* 675 F.2d 201 (8th Cir.), *aff'd,* 459 U.S. 801

(1982);[4] *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988) (three-judge court), *aff'd* 109 S.Ct.541 (1988). *Cf.* App. to Pet. for Cert. at 115a (terming the history of official discrimination against black voters a "given").

Today, even when black voters do manage to surmount this legacy of discrimination--as well as the tremendous barriers that still preclude many of the county's black residents from registering and voting, *see infra* pages 16 to 18--they are still unable to nominate and ultimately to elect the candidates of their choice because of Arkansas' primary runoff requirement.

In the two most recent election cycles for countywide office in Phillips County, four black candidates, competing for separate offices, received the highest totals of votes cast in the first Democratic primary. Yet all four of those plurality winning candidates were subsequently unable to

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[4]The largest concentration of black voters in Phillips County lives in West Helena.

obtain the Democratic Party nomination because they were defeated by white candidates in head-to-head primary runoff contests. (There was no Republican opposition in the general election for any of these positions.) By contrast, no white candidate who has ever led a preferential primary in Phillips County has been defeated in a runoff. In all four black-white contests in which a black finished first in the initial election, the white candidate was able to come from behind to win the runoff.[5]

There are two major reasons why the runoff system operates to defeat black candidates: the extreme level of racial bloc voting in Phillips County and the interaction of the runoff system with the devastating poverty and continuing effects of past official discrimination that permeate the black community.

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[5]In the two black-white contests in which a white candidate won the initial election, the white candidate was able to maintain his lead in the runoff.

1. *The runoff's interaction with racial bloc voting in Phillips County*

Voting patterns in Phillips County are characterized by "extreme" racial polarization. App. to Pet. for Cert. at 107a; 116a. Petitioners' expert political scientists as well as experienced political observers of the Arkansas Delta--both white and black, Republicans and Democrats--testified without contradiction to the extraordinary levels of bloc voting.

Dr. Richard L. Engstrom, Research Professor of Political Science at the University of New Orleans, whose work on racial bloc voting has been cited with approval by this Court in *Gingles*, 478 U.S. at 53 n. 20 and 55, performed both extreme case analysis and bivariate ecological regression analysis on the fifteen county-wide, city-wide, and state legislative elections since 1984 in which both black and white candidates competed. He concluded that in all fifteen elections, voting was racially polarized as

that term was defined in *Gingles*: black candidates were supported by an average of over 94 percent of black voters, but in no contest did more than 4.9 percent of the white voters support a black candidate; in six of eight countywide races, virtually no white voters supported the black candidate.

The extreme racial bloc voting to which Dr. Engstrom testified was demonstrated once again by the results of the 1988 preferential and runoff primaries. The preferential primary took place on the second day of the trial in this case. Two black candidates sought the Democratic nomination for different countywide offices and received the support of over 90 percent of the voters in the virtually homogeneous black precincts while receiving less than 6 percent of the votes from the virtually homogeneous white precincts. Sam Whitfield came in first in a four-way race, receiving 37.4 percent of the vote, and Linda Whitfield lost a challenge to the white incumbent, receiving 42.9 percent

of the vote in a head-to-head contest.

In the runoff election two weeks later (in which Sam Whitfield, the preferential primary winner, competed and lost to the white candidate who had finished second in the preferential primary), voting was even more polarized, with Sam Whitfield receiving an average of 95.6 percent of the votes in the overwhelmingly black wards and an average of only 3.1 percent in the overwhelmingly white wards.[6]

Party officials also testified that voting in Phillips County is racially polarized. John Anderson, the chairman of the county Democratic Party, testified that race is a "more significant" factor in Phillips County politics than it used to be and that "both sides will vote for white [candidates] because they're white or a black because they're black regardless of the reputations or ability of either candidate." Bankston Waters, the head of the Republican

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[6]The results of the runoff primary were admitted into evidence as a supplemental exhibit pursuant to the district court's order.

Party in Phillips County, also stated that voting in Phillips County split along racial lines. The same conclusion--that voting in Phillips County was extremely racially polarized--was reached by every lay witness who addressed the question. Not a single witness testified to any white crossover voting in a single election contest in Phillips County.

Racial bloc voting interacts with the runoff requirement to deprive black voters in Phillips County of the opportunity to nominate and elect their preferred candidates in this fashion. The electorate in the county is primarily white. *See* App. to Pet. for Cert. at 6a, 22a, 105a. Thus, a black candidate can finish first only when the white community splits its support among two or more (invariably white) candidates. A black candidate has never received a majority of the votes cast in a primary election; at best, he or she has finished first by a plurality. The majority-vote requirement necessarily forces a black plurality winner into a head-to-

head contest against one white opponent. In such a contest, pervasive racial bloc voting has guaranteed that the white candidate will win.

For white voters, the majority-vote requirement lets them, in effect, have a separate white primary in the preference race among themselves, with the most popular white candidate being able to attract the support of all white voters in the black-white runoff. As U.S. Assistant Attorney General Dunne noted, the runoff serves as an "electoral steroid" for the remaining white candidate, by giving him or her an additional, artificially contrived, boost to win the nomination.

In any event, the majority-vote requirement has *not* in fact resulted in the winning candidate being the choice of a majority of those voting in Phillips County. Turnout in every runoff primary in Phillips County was lower than turnout in the preferential primary. In three of the four runoff primaries in which black candidates were overtaken

by whites who had finished behind them, the winner's total votes, although a majority of the votes cast in the runoff, did not represent a majority of the total votes cast in the preferential primary. (The winning total in the runoff was 46 percent of the number of votes cast in the preferential primary for county judge; the winning total in the runoff was 46 percent of the number of votes cast in the preferential primary for circuit clerk; and the winning total in the runoff was 42 percent of the number of votes cast in the preferential primary for coroner *See, e.g.*, Trial Transcript at 556-60, 563-64, 589). In fact, in one of the four runoffs, the decline in turnout was so steep that the white runoff "victor" actually received fewer total votes in the runoff than the black plurality winner had received in the preferential primary! *Id.*

2. *The runoff's interaction with other social and historical conditions in Phillips County*

Several features of the runoff system as it interacts with social and political factors in Phillips County exacerbate its discriminatory impact. Phillips County's black residents suffer from "devastating" poverty. App. to Pet. for Cert. at 119a. With respect to education and income--the socioeconomic indicators most closely correlated with political participation--blacks in Phillips County lag far behind whites.[7] Petitioners' expert, Dr. Richard L. Engstrom, testified that he had never analyzed data for an area in which the black community was as disadvantaged, in both absolute and relative terms, as it is in Phillips County.

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[7]The median years of school completed by white adults in Phillips County is 12.2, compared to 8.4 for blacks, and 58.3 percent of white adults are high school graduates, whereas only 22.9 percent of black adults are high school graduates. *Per capita* black income in Phillips County is only $2336, and the median family income in Phillips County for black families in Phillips County ($6437) is only 39 percent of the median family income for white families in the county ($16,440). A majority of black families in Phillips County (53.6 percent) have incomes below the federally defined poverty level, and over four times as many black families as white families live below the poverty line.

Access to motor vehicles and telephones is a particularly important socioeconomic indicator for political participation because these politically relevant private resources are critical to effective voter mobilization, including seeking information about registration requirements and getting out the vote on election day. The district court recognized that "not having a telephone or an automobile makes it more difficult and less convenient for a citizen to qualify for, and to exercise, his or her voting rights." App. to Pet. for Cert. at 123a. The black community has far less access to these critical resources than does the white community. While only 9.0 percent of white households have no vehicle available, and only 10.9 percent have no telephone, 42.0 percent of black households have no vehicle and 30.5 percent have no telephone.

Many poor and less educated black citizens in Phillips County were unaware of their political rights; they still believed that they must pay a poll tax to be entitled to vote.

Others, who are economically dependent on the white community, are intimidated from full participation. Some lack transportation to get to polling places, which are often located long distances from black neighborhoods. Still others, worn down by generations of racism and oppression, have a sense of futility about the efficacy of the political process. *Cf.* App. to Pet. for Cert. at 123a (recognizing that "lack of education" and feelings of "estrangement, frustration, [and] futility" are "likely bases" for nonparticipation in politics).

These socioeconomic factors interacted in five separate ways with the runoff requirement to further decrease the political efficacy of Phillips County's black citizens. First, the short period of time between the preferential election and the runoff crippled fundraising in the economically disadvantaged black community. Second, the short time period made it difficult for black candidates to educate their often politically unsophisticated supporters about the need to

return to the polls despite the black candidate's apparent victory.[8] Third, because fewer black candidates are competing in the runoff election (since the results for many offices were already determined by the preferential primary) there were fewer get-out-the-vote activities in the black community and the financial burdens on the remaining black candidates were greater. Fourth, the fact that polling places in the black community were changed, without advance notice, on the eve of the election and between preferential and runoff elections,[9] depressed black participation since many black voters were confused or discouraged from

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[8]Linda Whitfield testified that she received numerous congratulatory calls after her first place showing in the May 1986 primary, from people who did not understand that she had not yet won the nomination. Many blacks, even after being told that they had to return to the polls a second time, refused, saying "Well, the white folks are just going to take it away from you."

[9]One witness testified without contradiction that in Ward 1, West Helena, a 98 percent black precinct with the highest concentration of blacks in Phillips County, polling places were changed five times in ten election contests over a two year period.

participating.[10] Indeed, it is uncontested that in every runoff election black participation declined from its rate in the corresponding preferential election. Fifth, runoffs further polarized an already divided community.[11] In sum, the use of runoff elections in Phillips County exacerbates the numerical and socioeconomic disadvantages of the black community, while enhancing the likelihood that racial bloc voting will result in the defeat of the candidate preferred by the black community.

By contrast to the virtually certain defeat of their preferred candidates in runoff systems, black voters within

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[10]In jurisdictions covered by section 5 of the Voting Rights Act (at the time of the trial in this case Arkansas was not yet subject to section 5), changes in polling places must be approved *in advance* by either the Attorney General of the United States or the United States District Court for the District of Columbia, precisely because such changes pose the potential for intentional discrimination against minority voters or for a discriminatory impact on minority political participation. *See Perkins v. Matthews*, 400 U.S. 379 (1971).

[11]For example, using extreme case analysis, white crossover votes for black candidate Sam Whitfield decreased between the 1988 preferential primary and the 1988 runoff. Moreover, in 1986, a few store owners who initially accepted Linda Whitfield posters along with those of white candidates in the first primary refused her literature but not that of the white candidate in the runoff.

Phillips County *have* been able to elect their preferred candidates to local office under plurality-win systems. *See Perkins v. City of West Helena*, 675 F.2d 201, 203 (8th Cir.), *aff'd*, 459 U.S. 801 (1982). Thus, the presence of a runoff has a direct causal relationship to the inability of black voters in Phillips County to elect the candidates of their choice.

3. *The tenuousness of the policy underlying the use of runoff primaries*

The sole justification for the use of runoffs articulated by respondents was that it fosters the election of candidates who represent the views of a majority of the population. As we have already seen, however, the use of runoffs in Phillips County does *not* have that effect. *See supra* pages 14 to 15. In addition, however, the very structure of Arkansas' election laws shows that this is not in fact a consistent state purpose. Under the Arkansas Constitution,

the State's six "constitutional" offices--Governor, Secretary of State, Treasurer, Attorney General, Auditor, and Commissioner of Lands--may all be elected by a simple *plurality*. Indeed, in *Rockefeller v. Matthews*, 249 Ark. 341, 459 S.W.2d 110 (1970), the Arkansas Supreme Court struck down as unconstitutional an attempt to extend the majority-vote requirement to the general election for these positions. Similarly, state senators and representatives may be elected by a plurality, rather than a majority. Thus, neither the State Constitution nor any state statute applies a majority-vote requirement to these critical state positions.[12]

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[12]Not until 1975 did the state impose a majority-vote requirement in *any* local general elections; not until 1983 did it create a statewide majority-vote requirement for most county or local general elections; not until 1990 did it extend that requirement to municipal offices in all cities and towns. In all three cases, the imposition of the requirement was racially motivated: it followed directly on the heels of a black candidate's having achieved a plurality victory. *See Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990), slip op. at 24:

> "We cannot ignore the pattern formed by these enactments. Devotion to majority rule for local offices lay dormant as long as the plurality system produced white office-holders. But whenever black candidates used this system successfully--and victory by a plurality has been virtually their only chance at success in at-large elections in majority-white cities--the

The state never explained why its purported interest in majority rule is served by requiring a majority vote for nomination by a primary while permitting election by a plurality.[13]

Nor, despite the district court's suggestion, does the runoff requirement enhance coalition-building within political parties. *See* App. to Pet. for Cert. at 73a, n.1; *see also* 103a. There was no evidence in the record to suggest that

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response was swift and certain. Laws were passed in an attempt to close off this avenue of black political victory. This series of laws represents a systematic and deliberate attempt to reduce black political opportunity. Such an attempt is plainly unconstitutional. It replaces a system in which blacks could and did succeed, with one in which they almost certainly cannot. The inference of racial motivation is inescapable."

[13]The district court observed that "[i]n the hierarchy of the fundamental values of a democratic states, the manner in which political parties choose to identify their nominees for public office positions is not as important as the procedures used to control the actual election of such public officers." App. to Pet. for Cert. at 71a n. 1. With respect to the fundamental value of racial fairness contained in the Constitution and the Voting Rights Act, the district court was wrong: racial discrimination is forbidden in the *nomination* process as well as the general election itself. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (white primary violates Fifteenth Amendment); Voting Rights Act, § 2(b) (violation of section 2 is established when the processes leading to "nomination *or* election" are not equally open) (emphasis added).

the desire to promote coalition-building was in fact a state policy; indeed, the respondents never mentioned such a goal. Nor, using the district court's own analysis, could enhancing biracial appeals have been a purpose in enacting a primary runoff requirement, since the requirement was adopted at a time when blacks were completely excluded from the Democratic Party, App. to Pet. for Cert. at 70a. To the contrary, the evidence showed that runoff requirements have been adopted in Arkansas because they enable the white community to exclude blacks from the coalition-building process. *See supra* note 12. Finally, the evidence is unrebutted in this case that because whites absolutely refuse to support black candidates in Phillips County, the majority-vote requirement does just the reverse--it promotes coalition building within the white community only. In the first primary, white voters can select the most popular white candidate to then coalesce behind in the runoff to defeat the black candidate. Election

returns from Phillips County showed that polarization was often more extreme in the runoff than it was in the initial election.

Course of the Proceedings Below

Petitioners' complaint challenged both Arkansas runoff statutes, claiming that they violated the results test of amended section 2 as well as the intent tests of both amended section 2 and the Fourteenth and Fifteenth Amendments.[14] After a three-day trial, in which the state attorney general represented the respondent Democratic Party organizations despite the fact that *every* state official defendant had been dismissed from the lawsuit, the district

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[14]On the eve of trial, the district court dismissed petitioners' challenge to the general election runoff on the ground that the governor and secretary of state were not proper and adequate defendants in such a lawsuit; instead, the district court held, petitioners were required to have sued the local election officials actually responsible for conducting elections and counting the ballots. *See* App. to Pet. for Cert. at 141a; *id.* at 155a. In addition, it dismissed petitioners' suit because no black candidate had in fact lost a general election in a runoff. *Id.* at 164a-167a.

court dismissed petitioners' challenge to the primary runoff statute. It concluded, first, that because blacks were a majority of the total population (although not of the electorate), they were barred as a matter of law from bringing a section 2 claim. App. to Pet. for Cert. at 107a-108a. Second, although the district court recognized that the Senate Report had expressly singled out the majority-vote requirement as a discrimination-enhancing device, it declined to give any weight to that conclusion. *See* App. to Pet. for Cert. at 118a. Indeed, it described the Senate Report factors, upon which this Court placed great weight in *Gingles* as "more [of] a distraction than a useful tool for evaluating the cause and effect operation of the challenged runoff laws." App. to Pet. for Cert. at 130a. It held, essentially, that majority-vote requirements were so central to democratic principles that they were immune from attack as racially discriminatory devices.

A divided panel of the Eighth Circuit reversed. It

found that the undisputed evidence showed that black voters were in fact a minority of the Phillips County electorate (and the district court's finding to the contrary was unsupported by any record evidence) and held that, in any event, section 2's protection was not limited to numerical minorities. *See* App. to Pet. for Cert. at 20a-22a. It further held that the district court had committed critical legal error in refusing to apply the analysis set out on pages 28-29 of the Senate Report and approved by this Court in *Gingles*, App. to Pet. for Cert. at 26a-27a. It noted the uncontested evidence regarding the presence of critical Senate Report factors--such as a history of discrimination; extreme bloc voting; "devastating" socioeconomic deprivation; the "dominati[on] over qualifications and issues" of candidates' racial identity; and the complete lack of black electoral success, App. to Pet. for Cert. at 28a-29a--and concluded that "based on the proof set forth by Whitfield and the totality of the circumstances in Phillips

County, a section 2 violation has been established under the results test." App. to Pet. for Cert. at 37a.[15]

The Eighth Circuit granted respondents' motion for rehearing *en banc*. After reargument, the court of appeals affirmed the district court by an equally divided vote.[16]

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[15]It affirmed the district court's dismissal of the challenge to the general election on the ground that petitioners had failed to show that a black candidate had been defeated in a general election runoff in Phillips County. App. to Pet. for Cert. at 37a n. 4.

[16]Five of the nine active judges on the Eighth Circuit--Chief Judge Lay and Judges McMillian, John R. Gibson, Fagg, and Beam--would have reversed the district court. App. to Pet. for Cert. at 2a. The tie was the result of the fact that Senior Circuit Judge Bright was permitted to sit because he had sat on the original panel. *See* 8th Cir. R. 16(a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE THE LOWER COURTS WITH GUIDANCE ON HOW TO TREAT SECTION 2 CLAIMS CHALLENGING RUNOFF REQUIREMENTS

In *Gingles*, this Court did not address the question of how the lower courts should assess section 2 claims involving challenges to runoff election requirements. *See* 478 U.S. at 46 n. 12. The deadlock in the *en banc* Court of Appeals in this case, in which five circuit judges voted to affirm a district court that rejected completely the applicability of the Senate Report factors and this Court's opinions, shows how necessary further guidance from this Court is to the proper functioning of the Voting Rights Act.

All three branches of the government have repeatedly recognized the discriminatory impact of runoff requirements in jurisdictions where blacks are a minority of the electorate and racial bloc voting exists. The Senate Report

accompanying the 1982 amendment of section 2, which this Court has termed an "authoritative" source of congressional intent, *Gingles*, 478 U.S. at 43 n. 7, explicitly identifies majority vote requirements as a practice that can "enhance the opportunity for discrimination against the minority group." Senate Report at 29. *See also Voting Rights Act: Runoff Primaries and Registration Barriers: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong. 2d Sess. (1984) (collecting data and testimony regarding the discriminatory impact of runoff primaries).

This Court has also repeatedly found that runoff requirements improperly minimize black voting strength. In *City of Rome v. United States*, 446 U.S. 156 (1980), for example, this Court held that a change from a plurality-win system to a runoff system would have a discriminatory effect on black voters in Rome, Georgia:

[U]nder the pre-existing plurality-win system, a

> Negro candidate would have a fair opportunity to be elected by a plurality of the vote if white citizens split their votes among several white candidates . . . . The 1966 change to the majority vote/runoff election scheme significantly decreased the opportunity for such a Negro candidate since, even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage.

Id. at 183-84 (bracketed materials in this Court's opinion; internal quotation marks omitted); *see also, e.g., Gingles*, 478 U.S. at 39 (discussing three-judge court's finding that North Carolina's majority-vote requirement posed "a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice"); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1983) (striking down runoff requirement for municipal elections under § 5 of the Voting Rights Act).

Finally, the Attorney General, whose interpretations of the Act have been accorded "great deference" by this Court, *United States v. Board of Commissioners of Sheffield,*

Alabama, 435 U.S. 110, 131 (1978), has also repeatedly found that runoff requirements impermissibly diminish back voting strength. Indeed, during the period 1975-1980, the Attorney General objected, under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the adoption of *sixty-six* separate majority-vote requirements. Only annexations and at-large elections occasioned more objections. U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 187 (table 6.4) (1981) (compiling data regarding section 5 objections). And earlier this month, the United States filed suit against the state of Georgia, seeking the invalidation of its primary runoff statute under section 2.

The court below squarely rejected the position taken by this Court, Congress, and the Attorney General:

> It is interesting to note that the U.S. Supreme Court apparently has suggested that "majority" voting is a procedure that "may enhance the opportunity for discrimination." That is far from clear to the Court based on the evidence and authorities it has reviewed.

App. to Pet. for Cert. at 118a. In place of the intensely local, fact-specific appraisal required by Congress and this Court, it announced two novel and unsupportable legal principles. First, it rejected the applicability of the Senate Report factors to section 2 results claims. *See, e.g.*, App. to Pet. for Cert. at 130a ("the positive findings with respect to the Senate Report factors have no tendency to prove" a section 2 violation; instead, they serve as "a distraction"); *id.* at 111a (the Senate Report factors "more logically support proof relating to 'intent' issues that 'cause and effects' issues"). Second, it held that runoff requirements (which this Court has found racially discriminatory) are so fundamental a part of the American democratic system that they are simply immune from attack. *Id.* at 81a-82a.

This Court's opinion in *Gingles* provided lower courts with guidance on how to assess claims of vote dilution through submergence in multimember districts. *See Gingles*, 478 U.S. at 48-51 (setting out how the Senate Report factors

should be applied to claims that multimember districts violate section 2). However, it is clear from *Whitfield* and from the Second Circuit's opinion in *Butts v. City of New York,* 779 F.2d 141, 148-49 (2d Cir. 1985) (also holding that runoff requirements are not subject to challenge under section 2), *cert. denied*, 478 U.S. 1021 (1986), that lower courts faced with challenges to runoffs are refusing to apply the "intensely local appraisal of the design and impact of the contested electoral mechanism" based "upon a searching practical evaluation of the past and present reality" of politics within the relevant jurisdiction that this Court and Congress have mandated, *Gingles*, 478 U.S. at 79 (internal quotation remarks omitted); Senate Report at 30. This Court should grant certiorari to clarify the standards for assessing these increasingly common section 2 claims.

II. THE PER SE RULE THAT SECTION 2 DOES NOT PROTECT BLACK VOTERS IF BLACKS CONSTITUTE A MAJORITY OF THE POPULATION (BUT NOT A MAJORITY OF THE VOTING AGE POPULATION) ANNOUNCED IN THIS CASE SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

According to the most recent available, uncontested, census data, blacks form a bare majority of Phillips County's total population. (They are, however, a distinct minority of the population of voting age.)[17] The court below held that, "as a matter of law, the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of section 2 of the 1965 Voting Rights Act, as amended," App. to Pet. for Cert. at 106a-107a, since blacks were not a "minority," within the meaning of the statute.

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[17]The district court's suppositions to the contrary were clearly erroneous, as the stipulated figures from the Census Bureau show that blacks constitute 52.94 percent of the total population and 47.00 percent of the population of voting age. *See* App. to Pet. for C[illegible] at 6a. The stipulated figures also showed that the number of blacks in the county has been steadily declining over the past three decades. Finally, it was uncontested that blacks are a minority of registered voters.

That conclusion represents a complete misreading of section 2. The text of section 2 never uses the word "minority." By its terms, section 2 prohibits discrimination against "*any* citizen of the United States" on the basis of race or color, section 2(a) (emphasis added), and condemns electoral arrangements not equally open to participation by "members of a class of citizens protected by subsection (a)," section 2(b), without placing any strictures on the relative size of that class.

This rule conflicts with the decisions of this Court in two separate ways.

A. This Court Has Rejected the Use of Per Se Rules in Section 2 Cases

In *Gingles*, this Court held that in a section 2 lawsuit,

> the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S. Rep. 30 (footnote omitted), whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" *Rogers [v. Lodge,* 458 U.S.] at 621, quoting *Nevitt v. Sides*,

> 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622.

478 U.S. at 79. "The essence of a § 2 claim," then, is "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

This Court's interpretation in *Gingles*, as well as the actual outcome (which affirmed the finding of liability in four legislative districts and reversed the finding of liability in a fifth), thus clearly require jurisdiction-specific consideration of challenged electoral mechanisms, rather than the development of *per se* rules regarding the legitimacy of various practices.

Despite this clear directive, the court in this case announced a *per se* rule: "as a matter of law," regardless of social and historical conditions within Phillips County,

petitioners were barred from bringing a section 2 challenge to Arkansas' runoff requirements. App. to Pet. for Cert. at 106a-107a. Rather than discussing political reality in Phillips County, Arkansas, in 1988 or at any other time, the court's discussion focused on conditions in France, *id.* at 81a; Chile at the time of Allende's election in the 1970's, *id.* at 81a-82a; New York City during the 1970's, *id.* at 74a-78a; Virginia and Chicago, *id.* at 94a; and gubernatorial politics generally in the South between 1932 and 1977, *id.* at 99a and 102a. It relied on the experience with runoffs in these situations to hold that runoff provisions cannot be attacked under section 2. Such an approach clearly conflicts with the approach taken by this Court in *Gingles*. This Court should grant certiorari to make clear that the Voting Rights Act does not permit the erection of *per se* barriers to section 2 claims.

B. *The Specific Per Se Rule Created in this Case Conflicts with this Court's Decisions in* White v. Regester *and* Rogers v. Lodge *and with Decisions of the Fifth and Eleventh Circuits*

In this case, the court held that petitioners were barred as a matter of law from bringing a section 2 lawsuit because they were not a numerical minority in Phillips County. (In fact, blacks *are* a numerical minority of the voting-age population.) No other court has ever held that black voters are barred as a matter of law from bringing a section 2 lawsuit because black residents outnumber white residents of the relevant jurisdiction. To the contrary, both this Court and the Fifth and Eleventh Circuits have recognized that electoral arrangements can illegally diminish the voting strength of black voters even when they are a majority of the electorate.

Two of this Court's leading voting rights cases, *White v. Regester*, 412 U.S. 755 (1973), and *Rogers v. Lodge*, 458

U.S. 613 (1982), have reached precisely the opposite conclusion. *Rogers* involved a challenge to at-large elections in Burke County, Georgia, which was 53.6 percent black. *Id.* at 614. Despite this numerical superiority, the Court concluded that the system denied black voters an ability to elect their preferred candidates. And in *White*, roughly half the population of Bexar County, Texas, was Mexican-American. The *White* district court squarely rejected the idea that only numerical minorities are protected: Such a position

> misconceives the meaning of the word "minority". In the context of the Constitution's guarantee of equal protection, "minority" does not have a merely numerical denotation; rather it refers to an identifiable and specially disadvantaged group.

Graves v. Barnes, 343 F. Supp. 704, 730 (W.D. Tex. 1972) (three-judge court), *aff'd in relevant part and rev'd in part on other grounds sub nom. White v. Regester*, 412 U.S. 755 (1973); *see also* 412 U.S. at 767 (district court properly

treated plaintiffs as a minority).[18]

Moreover, the decision in this case squarely conflicts with recent holdings of the Fifth and Eleventh Circuits. In *Monroe v. City of Woodville*, 819 F.2d 507 (5th Cir. 1987), the Fifth Circuit held that the fact that blacks constitute a majority of a jurisdiction's population *cannot* as a matter of law preclude a section 2 lawsuit. *Monroe* involved a challenge to at-large elections in a city whose total population was 60.5 percent black. *Id.* at 508. The Fifth Circuit held that plaintiffs must be given the opportunity to prove that, despite this numerical predominance, they did not enjoy the equal opportunity to elect the candidates of their choice. *Id.* at 511. Similarly, the Eleventh Circuit found a

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[18] *White* was one of two cases on which the Senate relied in articulating the section 2 "results test." The other was *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). *See* Senate Report at 23, 27-28. *Zimmer*, like *White v. Regester* involved a predominantly minority jurisdiction. East Carroll Parish, Louisiana, was roughly 59 percent black in total population, 485 F.2d at 1301. Nonetheless, there too the court found racial vote dilution.

section 2 violation in Dallas County, Alabama, which was 55 percent black in total population and 49 percent black in voting-age population. *United States v. Dallas County Commission*, 850 F.2d 1430, 1434 (11th Cir. 1988).

In sum, a clear conflict exists between the numerical threshold rule applied in this case and the approaches taken by this Court and the Fifth and Eleventh Circuits.

III. THE HOLDING BELOW THAT THE GOVERNOR AND SECRETARY OF STATE ARE NOT PROPER DEFENDANTS TO A STATUTORY AND CONSTITUTIONAL CHALLENGE TO A GENERAL ELECTION RUNOFF STATUTE CONFLICTS WITH ALMOST THREE DECADES OF THIS COURT'S DECISIONS

Petitioners' statutory and constitutional challenges to Arkansas' "systematic and deliberate attempt to reduce black political opportunity" through the enactment of a series of general election runoff statutes, *Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990) (three-judge court),

slip op. at 24,[19] was dismissed, prior to trial because the district court held that a challenge to a statewide election statute cannot be maintained against the Governor and Secretary of State as the only defendants. First, it held that plaintiffs wishing to bring such a challenge must also name the local officials physically responsible for running the elections:

> You've got to serve the people, it seems to me, who are charged with the duty of conducting the election or to effectuate the statute you are challenging. The Governor as such and the Secretary of State as such are not those people.

App. to Pet. for Cert. at 141a-142a. Second, it held that, because the duties performed by the Governor and Secretary are purely ministerial and compelled by statute, the Governor and Secretary are improper parties in any event:

> [N]o claim of wrongdoing has appropriately been asserted against those defendants . . . . [I]f the Court were to require that the defendant political county committees certify certain candidates, "the

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[19]The opinion in *Jeffers* was issued only a fortnight after the *en banc* decision in this case.

> separate defendants Clinton and McCuen cannot exercise their legal function in any way other than to issue commissions and certify candidates and results certified by local authorities."

App. to Pet. for Cert. at 155a. These holdings directly conflict with the longstanding precedents of this Court.

This Court has consistently treated governors and secretaries of state as proper and adequate defendants in voting rights cases, despite the fact that these officials neither physically conduct actual elections nor have any discretion under the state statutory schemes.

In the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), the lead defendant, Joe C. Carr, was the Tennessee Secretary of State. The duties that made him a proper defendant--furnishing envelopes and forms to county election commissions; maintaining election returns sent to him by the county commissions; and, along with the governor, declaring election results, *id.* at 205 n. 25--are identical to the duties performed by Secretary McCuen in this case. *See* Ark. Stat.

Ann. §§ 7-5-203 (secretary certifies lists of candidates to county commissions), 7-5-701(d) (secretary maintains election records); 7-5-704(a) (secretary informs governor of identity of winning candidates).

In case after case since *Baker v. Carr*, this Court has treated governors and secretaries of state as proper and adequate defendants in vote-dilution litigation. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964) (governor and secretary of state were only defendants); *Reynolds v. Sims*, 377 U.S. 533 (1964) (secretary of state); *Fortson v. Dorsey*, 379 U.S. 433 (1965) (secretary of state as only defendant); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (governor as only defendant); *White v. Regester*, 422 U.S. 935 (1975) (governor). *Cf. Rogers v. Lodge*, 458 U.S. 613 (1982) (county commissioners elected under at-large system being challenged were proper defendants although they had nothing to do with enactment or maintainance of system or with actual running of elections); *Thornburg v. Gingles*, 478 U.S.

30 (attorney general as defendant in section 2 case). No court has ever required the actual local officials who conduct elections also to be named.

Furthermore, in none of the cases cited in the previous paragraph was there any allegation that the relevant state official had himself willfully violated federal law. In each case, the named defendants performed solely ministerial duties.

Since *Ex parte Young*, 209 U.S. 123 (1908), it has been clearly established that plaintiffs may maintain federal lawsuits against state officials that allege that those officials' performance of ministerial duties denies the plaintiffs some federal right. The fact that state law requires the officials to act as they have has *never* before been used to immunize them from a suit requiring injunctive relief. Every Term, this Court decides cases involving claims for declaratory and injunctive relief against state officials performing their duties in accordance with state law. *See, e.g., Butterworth v.*

Smith, 110 S.Ct. 1376 (1990) (state attorney general as defendant in lawsuit challenging enforcement of state grand jury secrecy statute); *Quinn v. Millsap*, 109 S.Ct. 2324 (1989) (mayor and governor as defendants in lawsuit challenging property ownership as qualification for appointment to local board); *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989) (state secretary of state as defendant in lawsuit challenging statute regulating political parties). In fact, this Court has viewed officials performing ministerial functions as appropriate defendants even in cases where the official in fact *agrees* with the plaintiff's claim but is constrained by statute. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983).

In sum, the lower court's position in this case would require the complete abandonment of the entire structure of federal judicial review that has been erected since *Ex parte Young*. This Court should grant certiorari to make clear that plaintiffs may seek injunctions against state officials whose

ministerial acts violate federal law.[20]

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[20]The alternative ground for dismissal--that petitioners lacked standing to challenge the general election runoff statute because they had not lost an election, *as candidates*, due to the operation of the general election runoff, *see* App. to Pet. for Cert. at 155a--also squarely conflicts with congressional intent, *Gingles* and decisions of other circuits.

This Court has squarely held that section 2 *liability* (and therefore *a fortiori* standing) can be established even in cases where no minority-preferred candidate has yet been defeated by the operation of the challenged practice. "Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process." *Gingles*, 478 U.S. at 57 n. 25. This holding is critical to the operation of the Voting Rights Act, since one of the major consequences of discriminatory practices is that they *deter* the minority community from sponsoring candidates in the first place. *See, e.g., McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987); *Hendrix v. McKinney*, 460 F. Supp. 626, 631-32 (M.D. Ala. 1978) (Frank Johnson, J.).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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August 27, 1990

No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P.L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, and SAM BENNETT,
Petitioners,

v.

BILL CLINTON, Governor of Arkansas, W.J. MCCUEN, Secretary of State of Arkansas, THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS, THE DEMOCRATIC PARTY OF ARKANSAS, THE DEMOCRATIC STATE COMMITTEE, and THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

EIGHTH CIRCUIT COURT OF APPEALS' OPINION UPON REHEARING EN BANC 1a

EIGHTH CIRCUIT COURT OF APPEALS' PANEL OPINION 3a

MEMORANDUM OPINION OF THE DISTRICT COURT DISMISSING PETITIONERS' CHALLENGE TO THE PRIMARY RUNOFF STATUTE 58a

ORDER DISMISSING THE GOVERNOR AND SECRETARY OF STATE AS DEFENDANTS 132a

RELEVANT PORTIONS OF THE DISTRICT COURT'S ORAL RULINGS 135a

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ARKANSAS EASTERN DIVISION TELEPHONE CONFERENCE 145a

COURT OF APPEALS' OPINION UPON REHEARING EN BANC

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Appellants*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, the Phillips County Democratic Central Committee, and the Phillips County Republican Party Committee, *Appellees*.

No. 88-1953.

United States Court of Appeals,
Eighth Circuit.

Submitted April 10, 1990.

Decided May 4, 1990.

Appeal from the United States District Court for the Eastern District of Arkansas; G. Thomas Eisele, District Judge.

Carol Lani Guinier, Philadelphia, Pa., for appellants.

Tim Humphries, Little Rock, Ark., for appellees.

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, MCMILLIAN, ARNOLD, JOHN R. GIBSON,

FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

PER CURIAM.

In this matter, a panel of this court, Judge Bright, dissenting, reversed the Judgment of the district court. Whitfield v. The Democratic Party, 890 F.2d 1423 (8th Cir. 1989). After rehearing en banc, the judgment is now affirmed by an equally divided court. Judges Bright, Arnold, Bowman, Wollman and Magill vote to affirm the district court. Chief Judge Lay and Judges McMillian, John R. Gibson, Fagg and Beam would reverse. The Clerk of the Court is directed to issue the mandate forthwith.

COURT OF APPEALS' PANEL OPINION

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Appellants*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, the Phillips County Democratic Central Committee, and the Phillips County Republican Party Committee, *Appellees*.

No. 88-1953.

United States Court of Appeals,
Eighth Circuit.

Submitted June 14, 1989.

Decided Dec. 7, 1989.

Carol Lani Guinier, Philadelphia, Pa., for appellants.

Tim Humphries, Little Rock, Ark., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge and HANSON,* District Judge.

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* The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern District of Iowa, sitting by designation.

BEAM, Circuit Judge.

Whitfield and other appellants, black voters in Phillips County, Arkansas, challenge the district court's dismissal of their complaint. Whitfield sued the Democratic Party of Arkansas and others, alleging that a state statute which requires a general (runoff) primary election if one candidate does not receive a majority of the vote is both unconstitutional and in violation of section 2 et seq. of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1982). We affirm in part and reverse in part.

I. BACKGROUND

A. Facts

The population of Arkansas is approximately 16.3 percent black. Approximately 47 of the 75 counties in Arkansas have black populations below this statewide percentage, and twenty-one counties are less than one percent black. Twenty-two counties have a black population over

twenty-five percent.

The state has a history of official discrimination in its electoral process. Arkansas has used racially discriminatory voting practices such as statutory restrictions on the rights of blacks to vote, discriminatory literacy tests, poll taxes, a "whites only" Democratic primary, segregated polling places, and at-large elections. Perkins v. City of West Helena, Arkansas, 675 F.2d 201, 211 (8th Cir.), aff'd mem., 459 U.S. 801, 103 S.Ct. 33, 74 L.Ed.2d 47 (1982). See also Smith v. Clinton, 687 F. Supp. 1310, 1317 (E.D. Ark.) (taking judicial notice of the history of electoral racial discrimination in Arkansas), aff'd mem., ___ U.S. ___, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988).

The focus here is not only on the State of Arkansas, but also on Phillips County. While over fifty percent of the residents of Phillips County are black, black residents of legal

voting age number less than fifty percent.[1] Statistics on education and income, indicators closely correlated with political participation, see Perkins, 675 F.2d at 211, reveal that blacks in Phillips County are on the average much less educated and far poorer than whites.

No black candidate has been nominated for or elected to a county-wide or city-wide office or to a state legislative position from Phillips County since the turn of the century. In the past two years, four black candidates have come in first in preferential primary elections in Phillips County, yet all four were subsequently unable to obtain the Democratic nomination because they were defeated by white candidates in general (runoff) primaries.

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[1] According to the 1980 census, Phillips County had 34,772 residents. Of these, 16,100 (46.30%) were white and 18,410 (52.94%) were black. However, of the 22,110 residents age 18 and over 11,542 (52.20%) were white and 10,395 (47.00%) were black. Earlier census figures show that these percentages are generally stable. Exhibit JX1 at 1-3, Whitfield v. Democratic Party, 686 F. Supp. 1365 (E.D. Ark. 1988).

Racially polarized (bloc) voting is the norm in Phillips County. Whitfield's expert, who performed both extreme case analyses and bivariate ecological regression analyses on the fifteen county-wide, city-wide, and state legislative elections since 1984, testified that in all fifteen elections, voting was racially polarized as shown by the fact that black candidates were supported by an average of over ninety-four percent of black voters and, in most county-wide races, virtually no white voters supported black candidates.

B. The Primary Election Runoff Requirement

The Arkansas Code sets forth the procedures for primary elections, Ark. Code Ann. §§ 7-7-201 to -311 (1987), pursuant to amendment 29 of the Arkansas Constitution. Amendment 29 states:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

Ark. Const. amend. 29, § 5 (emphasis added).

Whitfield is challenging section 7-7-202, which states:

> (a) Whenever any political party shall, by primary election, select party nominees as candidates at any general election for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election on the respective dates provided in § 7-7-203(a) and (b).
>
> (b) A General primary election shall not be held if there are no races where three (3) or more candidates qualify for the same office or position as provided in subsection (c) of this section, unless a general primary election is necessary to break a tie vote for the same office or position at the preferential primary.
>
> (c) If there are no races where three (3) or more candidates qualify for the same office or position, only the preferential primary election shall be held. If all nominations have been determined at the preferential primary election, or by withdrawal of candidates as provided in § 7-7-304(a) and (b), the general primary election shall not be held.

Ark. Code Ann. § 7-7-202 (1987).

Under the current system, candidates for a particular party nomination run in preferential party primary elections. If three or more candidates run in the preferential primary,

and none receives a majority of the votes, the top two candidates are required to run in a subsequent general (runoff) primary election. Both appellants and appellees acknowledge that, in Arkansas, the Democratic nomination is tantamount to election for most local and state offices.

C. The District Court Holding

The district court dismissed Whitfield's constitutional challenge to section 7-7-202 because the court found no racially discriminatory purpose or intent underlying the primary runoff enactments. The Court also rejected Whitfield's argument that the runoff had been maintained for racially discriminatory purposes. Whitfield, 686 F. Supp. at 1370.

The district court denied relief under the Voting Rights Act, stating that the plaintiffs failed to convince the court that section 2 applies to runoff provisions such as those found in section 7-7-202, given the demographics of the area and the manner in which the runoffs operate. The court also

concluded that, even if section 2 does apply, the plaintiffs failed to sustain their burden of proof that section 7-7-202 results in blacks having less opportunity than whites to participate in the political process or to elect candidates of their choice. Id. at 1387.

II. DISCUSSION

A. Constitutional Violation

Whitfield argues that section 7-7-202 was enacted and has been maintained with discriminatory intent and thus violates the Equal Protection Clause of the fourteenth amendment. "[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" Rogers v. Lodge, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (quoting Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976)). "The ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group

is whether the [voting scheme] under attack exists because it was intended to diminish or dilute the political efficacy of that group." Rogers, 458 U.S. at 621, 102 S.Ct. at 3277-78 (quoting Nevett v. Sides, 571 F.2d 209, 226 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed. 2d 807 (1980)).

A plaintiff challenging the constitutionality of a discriminatory electoral system must prove, by a preponderance of the evidence, that the defendant had racially motivated discriminatory intent in enacting or maintaining a voting practice. Perkins, 675 F.2d at 207; Nevett, 571 F.2d at 219. See also City of Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1549 (11th Cir. 1987), cert. denied sub nom. Duncan v. City of Carrollton, Georgia, Branch of the NAACP, ___ U.S. ___, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (citations omitted). The trial court must consider "the totality of the circumstances" surrounding the alleged

discriminatory practice in order to "determine whether the [challenged voting practice] was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect [candidates] of their choice." Perkins, 675 F.2d at 209. "Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is [the clearly erroneous standard]." Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Whitfield provided the following evidence of racially discriminatory purpose. First, in 1939, at the time the primary runoff statute was adopted in its original form, Arkansas was a one-party state and the Democratic white primary was the only election that mattered. At the same time, an amendment to repeal a poll tax, which effectively disenfranchised blacks, failed. Second, after the white

primary was held unconstitutional by the Supreme Court in the 1940s, the majority runoff system was retained to diminish black electoral influence. Third, the recodification of the Election Code in 1969 maintained the use of runoffs in primary elections. Fourth, in 1975 and 1983, attempts were made to also impose general election runoffs in response to the presence of black candidates in multi-candidate municipal contests. Finally, the current version of the statute was passed in 1983; two members of the legislature who served that year testified that the statute was intended to prevent blacks from winning further elections due to splits in the white community.

Based on a detailed review of the evidence surrounding the enactment of section 7-7-202 and the adoption of amendment 29 of the Arkansas Constitution, the district court held that Whitfield failed to establish his constitutional challenge to the Arkansas primary runoff requirement. Whitfield, 686 F. Supp. at 1374. The court noted that the

majority vote requirement set forth in the state constitution was initiated through petitions (not by the legislature) and adopted by a vote of the people of the State of Arkansas at a time when blacks in Arkansas could not vote in the Democratic primary. The requirement could not have been maintained by the General Assembly with discriminatory intent because nothing in the record indicates that the legislature had the power to repeal amendment 29. In fact, in 1940, the Arkansas legislature proposed an amendment to repeal amendment 29, but that effort was soundly defeated by the popular vote. Id. at 1371. The court determined that "the issue is beyond direct legislative reach" and thus concluded that the actual purpose behind the enactment of section 7-7-202 was the stated purpose "to insure that no one was nominated as a candidate of the Democratic Party who had not received a majority of the votes cast." Id. at 1370-71.

We agree that discriminatory legislative intent has not

been adequately established, given the time frame and political background of amendment 29. While the legislators may have enacted more recent statutes which continue to advocate primary runoffs, they were mandated to continue the use of runoffs by the state constitution and voter tendencies present in Arkansas. The district court's conclusion that discriminatory intent was not proved is not clearly erroneous. Thus, we affirm that portion of the district court opinion.

B. Violation of the Voting Rights Act

Section 2 of the Voting Rights Act provides:

> Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United

States to vote on account of race or color, * * * as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

1. Applicability of the Act

The Democratic Party urges us to affirm the district court's holding that section 2 of the Voting Rights Act does not apply to section 7-7-202. The Party notes that virtually all of the cases decided under section 2 deal with at-large elections or legislative districting matters. We conclude, however, that section 2 was not meant to apply only to cases challenging at-large election schemes and districting matters, although it is true that most of the previous section 2 cases concern these types of discriminatory voting practices.

The Senate Report emphasizes that section 2 is the "major statutory prohibition of all voting rights discrimination," prohibiting practices which "result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess. 30 reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207 (emphasis added). Nowhere in the language

of the statute did Congress limit the application of section 2 cases to those involving at-large elections or redistricting; in fact, the Senate Report specifically identifies "majority runoffs [which] prevent victories under a prior plurality system" as a "dilution scheme[] * * * employed to cancel the impact of the * * * black vote." Id. at 6, 1982 U.S. Code Cong. & Admin. News at 1983.[2]

The district court stressed that majority rule is one of the underlying concepts of our democratic system. However, we agree with the Fifth Circuit that "[t]he fact that majority vote requirements may be commonplace does not alter the fact that Congress clearly did conclude that such provisions could serve to * * * dilute the voting strength of minorities."

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[2] We recognize that this language in the Senate Report refers, in part, to section 5 of the Act which section deals with "preclearance" of changes in election laws in certain jurisdictions. Nonetheless, we believe this legislative discussion, which encompasses both special practices and general prohibitions clearly supports our analysis of congressional intent on the scope of section 2 of the Act.

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201, 1212 (5th Cir. 1989) (citing Thornburg v. Gingles, 478 U.S. 30, 56, 106 S.Ct. 2752, 2769, 92 L.Ed.2d 25 (1986)).

Furthermore, the Supreme Court has explicitly stated that "[s]ubsection 2(a) prohibits all States and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities." Gingles, 478 U.S. at 43, 106 S.Ct. at 2762 (emphasis in original). The Court has specifically recognized majority vote requirements as "potentially dilutive electoral devices." Id. at 56, 106 S.Ct. at 2769. Here, that potential has been realized.

The district court held, "as a matter of law, that the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state

of Arkansas as a violation of Section 2 of the 1965 Voting Rights Act, as amended." Whitfield, 686 F. Supp. at 1381. The court based this premise on "the circumstance that the voting age populations of blacks and whites in Phillips County is equal for practical purposes." Id. The court rejected the idea that "even where black voting populations equal or exceed white voting populations, blacks should nevertheless be considered a 'minority' because of the evidence that they have not participated in the past in the political processes of the county in as large a proportion as have whites." Id.

We disagree with the district court's analysis of this issue. The inquiry does not stop with bare statistics. Section 2 is not restricted to numerical minorities but is violated whenever the voting strength of a traditionally disadvantaged racial group is diluted. "[H]istorically disadvantaged minorities require more than a simple majority in a voting district in order to have * * * a practical opportunity to elect candidates of their choice." Smith v. Clinton, 687 F. Supp.

1361, 1362 (E.D. Ark.), aff'd mem., ___ U.S. ____, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988). We conclude, as a matter of law, that a numerical analysis of the voting age population in a particular geographic area does not automatically preclude application of section 2 to a challenged voting practice used in that area.

Furthermore, the parties stipulated to census figures showing that blacks do constitute a minority of the voting age population in Phillips County (47%). In addition, at every election studied by Whitfield's expert, blacks turned out at a lower rate than whites. Thus, although theoretically a black candidate may be able to muster a majority of the votes in Phillips County, the practical reality is that there simply are not enough blacks voting in each election to allow a victory for a black candidate.

While the district court believes that the registration level of voting age blacks is equal, or nearly equal, to that of voting age whites in some of the challenged geographic areas,

we find that conclusion to be speculative. Whitfield points out that the census data in the record contains no references whatsoever to registration rates, and indeed, Arkansas apparently does not keep such data by race. Appellants' Brief at 12 n. 12. The district court also supports its conclusion by relying on the fact that efforts to register blacks have greatly increased in recent years and black citizens no longer face harassment and intimidation in registering and voting. However, if we were also permitted to speculate, we would probably conclude that even with these changes in Arkansas politics, the voting statistics show that black registration numbers are still significantly lower than white voter levels. Blacks could not vote at all in the State of Arkansas until 1940, and as such blacks have had less than fifty years to increase their voter numbers. Their registration level could hardly be equal to that of the white community, which has been able to recruit and assemble voters since the creation of the state.

2. Discriminatory Results

The district court also concluded that, even if section 2 did apply to majority runoff requirements in Phillips County, Whitfield failed to prove that, based on a totality of the evidence, section 7-7-202 results in discrimination against blacks in Phillips County. We disagree.

Although the district court apparently recognized that "plaintiffs need not show "that the challenged voting practice or procedure was the product of purposeful discrimination," Whitfield, 686 F. Supp. at 1374, we believe the court failed to properly analyze the runoff requirement in light of the results-oriented test articulated in the Senate Report. Rather, it appears that the district court made a combined analysis of the discriminatory intent underlying section 7-7-202 and the cause and effect relationship between the runoff requirement and election results in Phillips County. This analysis circumvents the true issue: whether the challenged voting practice, a primary election runoff requirement, results in

blacks in Phillips County having less of an opportunity to participate in the political process and elect representatives of their choice.

Throughout the legislative history of the 1982 amendment to section 2, Congress emphasizes that a violation of this portion of the voting Rights Act may be ascertained through a results-oriented analysis. The Senate Report states that one of the objectives of the 1982 amendment was "to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation of that section." S. Rep. No. 417 at 2, 1982 U.S. Code Cong. & Admin. News at 178. The Report then elaborates on this stated purpose:

> This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. * * * The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test * * *.

This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. Id. at 2, 1982 U.S. Code Cong. & Admin. News at 179. The Report reiterates that the legal standard set forth by the amendment to section 2 does not require proof of discriminatory purpose and thus a minority plaintiff may establish a section 2 violation by showing that the challenged electoral practice results in denial of equal access to the political process. Id. at 15-17, 27, 1982 U.S. Code Cong. & Admin. News at 192-94, 205.

The Supreme Court has recognized Congress's intent to establish a results test, stating:

> The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispositively rejects the position of the plurality in Mobile v. Bolden, 446 U.S.

55 [100 S.Ct. 1490, 64 L.Ed.2d 47] (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. The intent test was repudiated for three principal reasons--it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Gingles, 478 U.S. at 43-44, 106 S.Ct. at 2762-63 (quoting S. Rep. No. 417 at 2, 15-16, 27, 28, 36) (footnotes omitted).

Based on the clear language of the Senate Report and the Supreme Court's subsequent verification of the results

test, we reject the inferences made by the district court that Whitfield's failure to prove discriminatory intent under section 2 results in a dismissal of his claim. While proof of intent may be used to show a violation of section 2, S. Rep. No. 417 at 27 & n. 108, 1982 U.S. Code Cong. & Admin. News at 205, such proof is not required of a plaintiff under the statutory language.

The Gingles Court explained that "a court must assess the impact of the contested structure or practice on minority electoral opportunities" on the basis of the plaintiff's proof as to a variety of factors, as set forth in the Senate Report. Gingles, 478 U.S. at 44-45, 106 S.Ct. at 2763-64. "Typical factors" include (1) the extent of any history of official voting discrimination, (2) the extent of racially polarized voting, (3) the extent to which the state or political subdivision has used other voting practices or procedures which may enhance the opportunity for discrimination, (4) whether minority group members have been denied access to the candidate slating

process, (5) the extent to which minority group members suffer the effects of discrimination "in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," (6) whether political campaigning has been typified by racial appeals, and (7) the extent to which minority group members have been elected to public office. S. Rep. No. 417 at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07.

The district court reviewed the evidence presented by Whitfield as it related to the factors set forth in the Senate Report. For five of the seven factors, the court made factual findings which favored the conclusion that section 2 had been violated in Phillips County. Specifically, the court found that (1) Arkansas has a long history of racial discrimination which has touched the rights of blacks to participate in the democratic process; (2) Phillips County has experienced "extreme racial polarization in voting" in recent years; (3) other than majority vote requirements, Phillips County has not

used any other "discrimination-enhancing" voting practices in the recent past; (4) no evidence was submitted on this point; (5) Phillips County has experienced "devastating" effects of discrimination in the areas of education, employment, and health, because of "dire economic circumstances"; (6) although no evidence was presented of significant, overt or subtle racial appeals, race does play "a central role" in Phillips County politics and has "frequently dominated over qualifications and issues"; and (7) no black candidate has ever been elected to county-wide or state legislative office in Phillips County. Whitfield, 686 F. Supp. at 1383-85.

After adopting these findings, the district court reasoned that "the Senate Report factors more logically support proof relating to 'intent' issues than 'cause and effects' issues." Id. at 1382. However, this conclusion is contradicted by the language of the Senate Report. After noting that plaintiffs who choose to establish a section 2 violation on the basis of intent may do so through direct or

indirect circumstantial evidence, the Report states, "If the plaintiff proceeds under the 'results test,' then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay [sic] behind its adoption or maintenance." S. Rep. No. 417 at 27, 1982 U.S. Code Cong. & Admin. News at 205. Contrary to the district court's opinion, we conclude that the factors set forth by the Senate Report are to be used primarily as proof of a section 2 violation under the results test. See id. at 28, 1982 U.S. Code Cong. & Admin. News at 206.

The district court also held that Whitfield did not meet his burden of proof of showing a causal connection between the runoff requirement and the lack of minority electoral success. We again disagree. During the past four years, but for the runoff primary elections, four black candidates would have been the Democratic Party's nominee. The court infers that the actual cause of lack of success by black candidates

was the lack of motivation on the part of black voters--apathy--and if black voters would turn out at the polls in high numbers, their candidates would not be defeated because forty-seven percent of the voting population is black and some cross-over voting does occur. It seems to us, however, that these conclusions are based on two erroneous premises: (1) that plaintiffs must actually prove a causal link between the lack of black electoral success and the discriminatory system being implemented against them, and (2) as noted above, that the Senate factors do not apply to the cause and effect analysis.

We agree that a causal connection between the challenged practice, as it occurs within the political climate of the geographic area, and the diluted voting power of the minority must be established. Here, the proof is two-fold. First, the plaintiffs have proved that the majority vote requirement has impaired their ability to elect a candidate because blacks of voting age, although they are numerous in

Phillips County, fail to turn out at the polls in numbers sufficient to meet a majority vote requirement. Second, the plaintiffs have established, through proof of Senate factors, that the political climate of Phillips County has caused the low voter participation, because "[o]nce lower socio-economic status of blacks has been shown, there is no need to show the causal link of this lower status on political participation." United States v. Dallas County Comm'n, 739 F.2d 1529, 1537 (11th Cir. 1984). The Senate Report states:

> [D]isproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417 at 29 n. 114, 1982 U.S. Code Cong. & Admin. News at 207 (citations omitted).

The evidence adduced, the stipulated facts, and the district court opinion all confirm that blacks in Phillips

County suffer from less education, less employment, lower income levels, and disparate living conditions as compared to whites. Blacks also suffer from the remnants of official discrimination in Arkansas.

> [P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process[,] * * * may cause blacks to register or vote in lower numbers than whites * * * [and] may * * * lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.

United States v. Marengo County Comm'n, 731 F.2d 1546, 1567 (11th Cir.), appeal dismissed, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984).

Here, the district court required an improper burden of proof of causal relationships by holding, in effect, that the socioeconomic factors and the effects of discrimination did not hinder blacks' ability to participate in any legally significant way. See Dallas County Comm'n, 739 F.2d at 1537. "It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which

flows from the existence of economic and educational inequalities." Id. (citations omitted). See also Marengo County Comm'n, 731 F.2d at 1569 (holding that "when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination, * * * the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else").

Furthermore, the district court improperly assumed that lack of motivation caused lower turnout at the Phillips County polls. See Gomez v. City of Watsonville, 863 F.2d 1407, 1416 (9th Cir. 1988) (stating that the district court should have focused only on actual voting patterns rather than speculating on reasons why minority voters were apathetic), cert. denied, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); Dallas County Comm'n, 739 F.2d at 1536 (concluding that "[t]he existence of apathy is not a matter for

judicial notice"); Marengo County Comm'n, 731 F.2d at 1568-69 (noting that "[b]oth Congress and the courts have rejected efforts to blame reduced black participation on 'apathy'"). Also, the internal documents in this case simply do not support such an assumption. While, as the district court recognized, blacks are working strenuously in Phillips County to register black voters and to encourage black voter participation, voter turnout is still low. Yet, black turnout at some of the general primary (runoff) elections did not drop as significantly as did white voter turnout, when compared with the preceding preferential primary. These factors indicate to us that black voters are not apathetic. We believe that other factors contribute to a lack of political participation which nonparticipation is significant enough to make a runoff election victory an impossibility for a black candidate.

The plaintiffs presented statistical and expert evidence on the lower social, educational, and employment conditions in Phillips County. Contrary to the district court's

determination, we conclude that such evidence is relevant to prove cause and effect. Thus, without more, the plaintiffs adequately carried their burden of proof that the majority runoff requirement, as it operates in the political system of Phillips County, has caused blacks in that county to have less opportunity than whites to elect the candidate of their choice.[3]

The Senate Report states that the factors enumerated

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[3] Judge Hanson's research in this matter turns up a significant factor which none of the parties has addressed through evidence or in briefs or oral argument; that is, that Arkansas election law does not preclude cross-party voting in runoff (general) primary elections. It is factually uncontested that virtually no white voters support black candidates in Phillips County.

Thus, the Phillips County runoff system permits white Republicans, if they have a mind to do so, to, at least in limited circumstances, support a white Democrat in a runoff primary and to further dilute black voting strength. This cross-over factor distinguishes and attenuates the holding in Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985) since Butts clearly dealt with a closed (no cross-over) runoff primary. While we subscribe to Chief Judge Oakes' panel dissent, which opinion fully supports our results, we believe that the precedential value of the majority opinion in Butts is erased when the cross-over component is added to the factual mix.

"will often be the most relevant ones," though in certain cases other factors may also be used to show vote dilution. S. Rep. No. 417 at 29, 1982 U.S. Code Cong. & Admin. News at 207. Here, a majority of the factors have been found by the district court to exist in Phillips County. Furthermore, the findings relating to the third and fourth factors do not weigh against the plaintiffs' proof. However, the final determination "of whether the voting strength of minority voters is * * * 'canceled out'" demands the court's "overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case." Id. at 29 n. 118, 1982 U.S. Code Cong. & Admin. News at 207. We conclude that, based on the proof set forth by Whitfield and the totality of the circumstances in Phillips County, a section 2 violation has been established under the results test.[4]

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[4] Whitfield has also asserted the argument that the district court erroneously dismissed the plaintiffs' challenge to the general election majority vote requirement. Before trial, the district court dismissed plaintiffs' claim, citing as one of its reasons lack of standing. Whitfield asserts that plaintiffs

C. Remedy

We are well aware of the difficulty of fashioning a remedy for Phillips County alone, while allowing the other counties of Arkansas to continue implementing a majority vote runoff requirement for primary elections. However, the evidence requires just such a remedy, and courts have created remedial orders which affect only one legislative district, while affecting no other portion of the Arkansas state legislative structure. See Smith v. Clinton, 687 F. Supp. at 1311; Smith v. Clinton, 687 F. Supp. at 1362 (rejecting the argument that any plan affecting only a single legislative district would interfere with the state-wide scheme of apportionment).

Where, as here, a violation of the Voting Rights Act

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had standing because they are black citizens and registered voters. We disagree with this argument. We conclude that the challenge was properly dismissed because the plaintiffs lacked standing in that no black had ever participated as a candidate in an election covered by the general (multi-party) election runoff statute and they failed to allege that such elections have been discriminatory in Phillips County.

has been established, "courts should make an affirmative effort to fashion an appropriate remedy for that violation." Monroe v. City of Woodville, Mississippi, 819 F.2d 507, 511 n. 2 (5th Cir. 1987) (per curiam), cert. denied, 484 U.S. 1042, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988). The legislative history of the Act states:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 417 at 31, 1982 U.S. Code Cong. & Admin. News at 208 (footnote omitted). In sum, "'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the

future.'" Ketchum v. Byrne, 740 F.2d 1398, 1412 (7th Cir. 1984) (quoting Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965)), cert. denied, sub nom. City Council v. Ketchum, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

We agree with the Seventh Circuit that it is not the proper role of an appeals court to formulate its own remedial plan "or to dictate to a district court minute details of how such a plan should be devised." Ketchum, 740 F.2d at 1412. Therefore, we remand this case to the district court with directions to formulate an appropriate remedy for violation of the Voting Rights Act in Phillips County. We instruct the district court to limit its remedy to within the borders of Phillips County, since the evidence requires such a limitation.

We are well aware of the district court's concerns that elimination of the primary runoff requirement may not provide a total solution to the problem of the inability of black candidates to be elected in Phillips County and, indeed,

may perpetuate racially polarized voting there. However, the majority vote requirement has, up to this point, prevented blacks from electing the candidates of their choice, and so, the elimination of that requirement is mandated by section 2. While the duties of a district judge are multitudinous, accurately forecasting the future is not one of them. Legislators are responsible for the results stemming from their decision-making. Thus, these potential problems are for Congress, not the courts, to solve. If the remedy fashioned for Phillips County serves to intensify the problem, as the district court anticipates, then the Congress will have to reevaluate section 2 as it is applied to realistic voting situations and the realities of political life in America.

III. CONCLUSION

Section 2 was broadly written to protect minorities from disparate voting practices and procedures, including majority vote requirements. The Gingles Court stated that "[t]he essence of a § 2 claim is that a certain electoral law,

practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47, 106 S.Ct. at 2764. We determine that this definition encompasses the Phillips County situation.

Therefore, while we affirm the district court's conclusion that Whitfield failed to prove his constitutional claim, we reverse the court's conclusion that section 2 of the Voting Rights Act of 1965, as amended in 1982, is inapplicable. We conclude that section 2 is violated by the application of Ark. Code Ann. § 7-7-202 to Phillips County, Arkansas. Thus, we remand to the district court for determination of the appropriate remedy in accordance with the instructions set forth in this opinion.

HANSON, Senior District Judge, concurring.

I write separately to express my concern over the remedy that will be required by this ruling. Although we

have left the remedy unspecified, it will necessarily leave Phillips County, Arkansas, with a voting procedure that, at least temporarily, varies from that used in the rest of the state.[5] This is a situation which I believe courts should avoid whenever possible because the fragmentation of state law is a grave matter. There is, however, no way to avoid this situation in this case.

The Fourteenth and Fifteenth Amendments to the United States Constitution undeniably vest Congress and the Judiciary with the power to end any and all state voting procedures which abridge the rights of minority citizens to vote. City of Rome v. United States, 446 U.S. 156, 173-79, 100 S.Ct. 1548, 1559-63, 64 L.Ed.2d 119 (1979); South Carolina v. Katzenback, 383 U.S. 301, 323-27, 86 S.Ct. 803,

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[5] It appears that the district court may receive some guidance on the potential breadth of the remedy available in this case by the ultimate disposition of Spallone v. United States, 856 F.2d 444 (2nd Cir. 1988), cert. granted, ___ U.S. ___, 109 S. Ct. 3211, 106 L.Ed.2d 562 (1989) (argued Oct. 2, 1989).

815-18, 15 L.Ed.2d 769 (1965). Congress, acting within the authority granted by these provisions of our Constitution, has mandated that no state voting procedure can be allowed to stand which "results" in the dilution of the voting strength of a traditionally disadvantaged racial group in "any state" or "subdivision" thereof. See 42 U.S.C. § 1973 (1982). I am bound to follow this mandate.

In this case, a most able and fair district judge has found inequalities which indicate a violation of this law in Phillips County, Arkansas. There is no doubt in my mind, that under the present factual situation, the primary run-off requirement dilutes the votes of Phillips County blacks in a manner proscribed by the Voting Rights Act. Further, I am not prepared to accept as a major premise in syllogistic argument the premise, which I believe underlies Judge Bright's dissent, that there can be no injustice where majority vote rules.

I do not know that Congress, in its passage of the

1982 Amendments to the voting Rights Act and adoption of the "results" test, fully recognized that the statute as crafted would open the door to the fragmentation of state law when a statewide law is shown to result in a dilution of minority voting strength in only one subdivision of a state. I assume, however, that Congress did intend the natural consequences of its actions. If they did not, it is up to Congress to act pursuant to their wisdom to change the law--not this court. Thus, because the people of this country, through the Congress and the Constitution, have decreed that no state voting procedure can be allowed to stand which results in the dilution of the voting rights of racial minorities in a subdivision of a state, I join in striking down the application of the law at issue in Phillips County.

I harbor no illusions that this ruling enforcing the Voting Rights Act will dissolve the racial prejudice which continues to haunt Phillips County. There are problems in social and political human relations which defy solution by

legislative action. And, as noted by Justice Holmes, legislative efforts to solve these problems often create uncertainties over which judges, with all their frailties, labor. Racial problems, are now, and have been, one of these most difficult areas of concern. Thus, although I join in striking down the barrier in this case, it seems to me that such problems can only be truly "solved" by time, patience, and most importantly, education.

My study and research on this matter does not disclose a perfect precedent for that action which we take today.

BRIGHT, Senior Circuit Judge, concurring in part and dissenting in part.

I write separately to express my disagreement with the reasoning and conclusion of the majority regarding section 2 of the Voting Rights Act. This case presents a voting rights challenge to the use of run-off primaries in elections for single-member offices, a procedure that without more does not dilute the opportunity of any group of voters to participate

equally with other voters in the political processes leading to the nomination and election of public officials. Accordingly, I dissent.

Run-off primaries serve a basic principle of representative government: majority rule. States have always had the right to require that a majority of the voters support the winner of an election. While it is unquestionably true that run-off primaries combined with at-large elections or other dilutive electoral devices can produce discriminatory results, see Thornburg v. Gingles, 478 U.S. 30, 56, 106 S.Ct. 2752, 2769, 92 L.Ed.2d 25 (1986); City of Port Arthur v. United States, 459 U.S. 159, 167, 103 S.Ct. 530, 535, 74 L.Ed.2d 334 (1983); Rogers v. Lodge, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982); White v. Regester, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973), no federal court has ever taken the position that run-off primaries standing alone violate section 2. Moreover, the only court ever faced with this issue reached the opposite

conclusion. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986). Because of the importance of the principle underlying run-off primaries, their long history and the absence of authority for the position the court today adopts, I would require explicit direction from Congress before invalidating the use of run-off primaries standing alone.

Section 2 of the Voting Rights Act is less than explicit. It states that an electoral procedure violates the Act if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [minority voters] in that [minority voters] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (1982).

Section 2 forbids two types of electoral procedures: restrictive procedures that prevent members of a minority group from voting and procedures that have the effect of

diluting minority voting strength. Butts, 779 F.2d at 148. In this case we confront the issue whether the use of run-off primaries standing alone dilutes minority voting strength. This issue does not lend itself to easy analysis because the phrase "vote dilution" "suggests a norm with respect to which the fact of dilution may be ascertained." Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1012, 105 S.Ct. 416, 422-23, 83 L.Ed.2d 343 (1984) (Rehnquist, J., dissenting from summary affirmance). No such norm exists.

The Senate Report accompanying the 1982 amendments to the Act set forth a list of "typical" factors relevant to the existence of a section 2 violation. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. While the Supreme court discussed these factors with approval in Thornburg v. Gingles, the Court nevertheless observed

> that this list of typical factors is neither comprehensive

> nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other. Rather, the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" and on a "functional" view of the political process.

478 U.S. at 45, 106 S.Ct. at 2763-64 (citing S. Rep. No. 417, 97th Cong. 2d Sess. 29, reprinted in U.S. Code Cong. & Admin. News at 206-07) (footnote and citations omitted). In this case, the majority does not conduct a searching evaluation but simply adds up a number of factors and concludes that a violation has occurred. Moreover, the majority fails to recognize that the district court conducted an appropriate evaluation.

In analyzing the effect of the run-off primary on the nomination of black candidates, District Judge Eisele quoted from the work of Professor Harold Stanley:

> The likelihood of black nominees gaining a plurality of the primary vote in a crowded field seems enticing enough to encourage some to argue for ending the runoff. However, in majority black districts--as supporters of the runoff point out--the lack of a runoff might cause several black candidates to split the black vote and allow a white candidate to gain a plurality nomination. Thus, the runoff can protect and promote black political prospects in majority black districts.

Whitfield v. Democratic Party, 686 F. Supp. 1365, 1378 (E.D. Ark. 1988) (quoting Stanley, Runoff Primaries and Black Political Influence, in Blacks in Southern Politics 259, 262-63 (1987)). Other commentators agree that invalidating the use of run-off primaries may hamper the ability of black voters to nominate their preferred representatives. McDonald, The Majority Vote Requirement: Its Use and Abuse in the South, 17 Urb. Law. 429, 437-38 (1985); Butler, The Majority Vote Requirement: The Case Against Its Wholesale Elimination, 17 Urb. Law. 441, 454 (1985). The able district judge cited evidence in the record to support his conclusion that the use of run-off primaries does not produce discriminatory effects: "The blacks have a voting

age population majority in some of the Justice of the Peace districts in Phillips County. If two or more blacks chose to run in the primary and only one white, then the same possibility, i.e., of a minority white plurality nominee, would occur." Whitfield, 686 F. Supp. at 1378. District Judge Eisele, residing in the state of Arkansas and familiar with its political processes, is in a far better position than we appellate judges to evaluate whether the run-off primary denies black voters an equal opportunity to nominate candidates of their choice.

Judge Eisele also reasoned that the existence of the run-off primary has the effect over time of easing racial polarization in voting. "[P]lurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built." Whitfield, 686 F. Supp. at 1386. In support of this statement, Judge Eisele observed:

> For Democratic candidates, nomination rules that encourage the seeking of biracial support, promote prospects for election. Retaining the runoff can lead to more black-white coalitions that [sic] back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization....

Id. at 1386 (quoting Stanley, Runoff Primaries and Black Political Influence, in Blacks in Southern Politics 259, 264 (1987)). Racial polarization needs discouragement not enhancement. We should avoid any conclusion, such as the one the majority reaches today, that has the effect of continuing racial polarization in voting.

In addition to failing to recognize that the determination of a section 2 violation depends on a searching evaluation of the political process, the majority opinion

MEMORANDUM OPINION OF THE DISTRICT COURT DISMISSING PETITIONERS' CHALLENGE TO THE PRIMARY RUNOFF STATUTE

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Plaintiffs*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, and the Phillips County Democratic Central Committee, *Defendants*.

No. H-C-86-47.

United States District Court,
E.D. Arkansas, E.D.

May 20, 1988.

Olly Neal, Kathleen Bell, Marianna[;] Lani Guinier, Pamela S. Karlan, New York City, for plaintiffs.

Tim Humphries, Asst. Atty. Gen., Little Rock, Ark., for defendants.

MEMORANDUM OPINION

EISELE, Chief Judge.

This case involves a challenge to Ark. Code Ann. § 7-

7-202, which requires that a candidate receive a majority of the votes cast in a political party's primary election in order to obtain the nomination of that political party. That section provides in pertinent part:

> Whenever any political party shall, by primary election, select party nominees as candidates ... for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election on the respective dates provided in section 7-7-202(a) and (b).

Without spelling it out the plaintiffs are actually attacking Amendment 29, Section 5 of the Constitution of Arkansas (adopted November 8, 1938) which provides:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law shall be placed on the ballots of any election. (Emphasis Supplied)

The majority vote requirement is established by Amendment 29 and the mechanisms for carrying it out are set forth in section 7-7-202.

Plaintiffs are proceeding under two distinct theories. First, they contend that section 7-7-202 and Amendment 29 result in their being less able than white citizens to participate in the political process and elect the candidates of their choice. This cause of action arises, they state, entirely under section 2 et seq. of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq. See Plaintiffs' Pretrial Brief, p. 2. Secondly, plaintiffs allege that section 7-7-202 and Amendment 29 were enacted and have been maintained for racially discriminatory reasons and, therefore, violate the fourteenth and fifteenth Amendments to the Constitution. The Court will deal with the latter contention first, i.e., plaintiffs' "intent" claims.

Plaintiffs' Constitutional Claims

Plaintiffs rely upon the City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) and Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). Under this theory, plaintiffs must establish that

section 7-7-202 and Amendment 29 were enacted, or has been maintained, for a discriminatory purpose. As stated in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977):

> [D]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available."

In making this determination, the Court may consider the factors identified in the Senate Report along with all the other facts and circumstances. See infra discussion of section 2 of the Voting Rights Act of 1965. As the Court understands the law in this area, if legislation was motivated or maintained out of a desire to discriminate against blacks on account of their race and if, indeed, such legislation in fact has that effect, it would violate the Equal Protection clause. With these legal principles in mind, the Court will discuss the history of Amendment 29 and section 7-7-202.

contains a second flaw: none of the authority cited by the majority supports a conclusion that section 2 applies to run-off primaries standing alone. The majority refers to the Supreme Court's recognition that majority voting requirements are "potentially dilutive electoral devices...." Thornburg v. Gingles, 478 U.S. at 56, 106 S.Ct. at 2769. But the Court in Gingles was referring to the use of majority vote requirements in connection with multi-member districts. The majority also refers to language in Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1212 (5th Cir. 1989), that majority voting requirements "could serve to further dilute the voting strength of minorities." The Westwego court, however, was remanding to the district court for a determination of whether an at-large voting scheme diluted the voting strength of minorities in violation of section 2. The Westwego court was merely recognizing that a majority vote requirement combined with an at-large voting scheme could dilute minority voting strength. Finally, the

majority states that the Senate Report that accompanied the 1982 amendments identified a number of "dilution schemes," including "majority run-offs...." S. Rep. No. 417, 97th Cong. 2d Sess. 6, reprinted in 1982 U.S. Code Cong. & Admin. News at 183. The quoted portion of the Senate Report, however, is discussing section 5, dealing with pre-clearance of legislative efforts to undermine the Act. Section 5 is obviously not at issue here and the Arkansas legislature enacted the run-off primary law long before passage of the Voting Rights Act.

As stated earlier, the only court to address the use of run-off primaries reached a conclusion different from the one the majority reaches today. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985). Butts involved a voting rights challenge to a New York statute that required a run-off primary if no candidate received more than 40% of the vote in the general primary. In holding that in the absence of dilutive electoral procedures the run-off primary at issue did

not violate section 2, the court stated:

> Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office. The distinction is implicit in City of Port Arthur v. United States, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982), where the Court struck down a run-off requirement that Port Arthur had appended to its at-large voting system for seats on the multi-member city council, but made no mention of a similar run-off requirement for the election of mayor. The latter run-off was not even challenged.
>
> ... The rule in elections for single-member offices has always been that the candidate with the most votes wins, and nothing in the Act alters this basic political principle. Nor does the Act prevent any governmental unit from deciding that the winner must have not merely a plurality of the votes, but an absolute majority (as where run-offs are required when no candidate in the initial vote secures a majority) or at least a substantial plurality, such as the 40% level required by § 6-162.

Id. at 148-49. The Butts rationale gives strong support to the district court's perceptive and well-reasoned opinion.[1]

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[1] Judge (now Chief Judge) Oakes dissented in Butts, contending that while minority voters have no right to "a proportionate 'share'" of a single member office, "they do have a right not to be subject to any structural process that

For all of the reasons given above, I would affirm.

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under the totality of circumstances deprives them of equal opportunity to field a candidate for one of those offices." 779 F.2d at 155 (Oakes, J., dissenting). Judge Oakes further opined that a run-off election after an open primary would not violate section 2. Id. (Oakes, J., dissenting). In footnote 3 of its opinion, the majority reveals that in this case Arkansas law does not prohibit cross-party voting. Thus, the Butts dissent seems not to support the opinion of the majority.

Arkansas has had such a majority-vote requirement since 1933. Prior to that time, at least two counties in Arkansas followed the practice without the benefit of any act of the Legislature.

In his inaugural address in January 1933, Governor Futrell stated, "nominations for public office should be made by a majority of the qualified electors voting at an election. By no means should an insubstantial minority be allowed to make a nomination." The bill was approved by the Senate by a vote of 28 to 0 on January 18, 1933, and passed the House by a vote of 84 to 3 on February 14. The Governor signed the bill and it became Act 38 of 1933.

Mr. Henry Alexander, in his article, "The Double Primary" in Volume 3 of the Arkansas Historical Orderly (1944) (cited by all parties and also by several of the witnesses) explained the overwhelming vote as follows:

> In view of the potent opposition in the legislature to earlier bills providing a double primary, passage of Act 38 with only three negative votes is difficult to

understand. The hectic Democratic primaries of 1932 may in some measure explain revival of agitation for the double primary system. The primary ballot of that year in Pulaski County, described as being "as long as your arm," contained seventy-six names exclusive of candidates for nomination to township offices and for election to party office. The ballot listed seven candidates for the gubernatorial nomination, a like number for the United States senatorial nomination. Six entrants sought the nomination for lieutenant governor and twenty candidates filed for seven other contested nominations to state office. Winners in several races failed to poll a majority of the votes case. J.M. Futrell, nominee for governor, polled less than forty-five per cent; Lee Cazort, nominee for lieutenant governor, less than thirty-one per cent. Converted to the principle of majority nominations by numerous minority nominations in the primaries of this and former years, a small group of influential citizens organized a Run-Off Primary Association. This short-lived organization was formed to advocate enactment of a double primary law at the 1933 session of the General Assembly. The organization, its headquarters in Little Rock, chose J. Bruce Streett, president, and Grady Forgy, secretary. Its officers had a hand in drafting Act 38 and its influence counted for much in obtaining passage of the statute.

During the 1935 legislative session, Act 38 was repealed. This prompted a movement to embody the majority-vote double primary system into the Arkansas Constitution where it would be beyond legislative power.

According to Mr. Alexander, in 1928, Mr. Brooks Hayes was runner-up in a seven-man race for the gubernatorial nomination which was won by Harvey Parnell with a plurality of less than 42%. Two years later, Mr. Hayes urged adoption of the double primary system in the form of an initiated amendment to the Constitution. Mr. Collins was at that time president of the Arkansas Bar Association. This effort culminated in the adoption of Amendment 29 to the Arkansas Constitution. The amendment covers a variety of "good government" election principles. For our purposes, the most important is found in Section 5, which reads:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

As stated by Alexander:

> Sponsors of the proposed amendment were moved, primarily, by hostility to committee nominations and

> special elections and, secondarily, by hostility to plurality nominations. The latter, however, should not be minimized. The section of Amendment 29 requiring the double primary was included in earliest drafts of the proposal. Suggestions, at one time considered, to incorporate provision for a double primary in a separate amendment were discarded. Writing on August 31, 1937, Abe Collins stated, with reference to the section of the proposed amendment requiring the double primary, "I think it is the most important part of it (draft of Amendment 29)." Opposition to minority nominations was strengthened in some quarters when, in the primary of August 11, 1936, Carl E. Bailey won the gubernatorial nomination in a five-man race by a plurality of less than thirty-two percent of the votes cast.
>
> Amendment 29 was laboriously drafted during a period of almost a year by Abe Collins, Judge B.E. Isbell of DeQueen, and Doctor Robert A. Leflar of Fayetteville. C.T. Coleman of Little Rock and Doctor J.S. Waterman of Fayetteville cooperated.

Dr. Leflar and Dr. Waterman are recognized nationally as legal scholars.

Over 18,000 signatures were needed in order to initiate Amendment 29. The effort was successful. According to Mr. Alexander:

> The press of Arkansas vigorously and almost without exception supported ratification of Amendment 29 at

> the general election in November, 1938. No organized opposition appeared and, on November 8, the measure was approved by narrow margin of 63,414 to 56,947. Opposition to ratification was somewhat centered in so-called "machine" counties. In eleven counties often so characterized ratification was opposed by a popular majority of 61.5 per cent of votes cast in these counties.

Two temporary enabling acts were then passed.

In 1939, the Legislature proposed Amendment 30 to the Constitution which would have abolished the double primary. That proposal was defeated by a vote of 96,628 to 70,131, indicating, according to Alexander, a strengthening of public sentiment for the double primary system.

The first of the enabling acts under Amendment 29, Act 372 of 1939, required that uncontested nominations and nominations with only two contestants be voted on at the second primary. This provision was intended to lessen the opportunity for interference in the second race by winners or losers in the first, the preferential, race and to counteract lack of voter-interest and non-voting in the runoff primary. Since

Act 372 expired by its own terms, it was necessary for the 1941 session of the General Assembly to reenact such enabling legislation. This was done and became Act 90 of 1941. This act also expired by its own terms causing the enactment of permanent enabling legislation in 1943, to wit: Act 238 of 1943. Mr. Alexander's comments are pertinent:

> The double primary system in Arkansas has had a checkered and stormy history. Opposition to the system is outspoken and lacks neither leadership nor strength. This writer ventures to predict, however, that this opposition will grow weaker; that the principle of majority nominations will become more secure.
>
> Political parties in Arkansas in the state, district, county or city may nominate candidates either by party primary or by party convention. Optional use of the primary, authorized in 1895, was retained by authors of Amendment 29 to accommodate the Republican Party. Expense of a primary is unwarranted by the limited voting strength of the minority party. Optional use of the primary was retained also to allow Democratic nominations to be made by convention to fill vacancies in nominations and to select candidates to run in special elections. Direct nominations in these circumstances would not be feasible in all cases.
>
> Should a political party choose to nominate its candidates by primary such nominations, by provision of Amendment 29, must be made by majority vote.

> The wisdom of incorporating the mandate of majority nominations in the state's fundamental law, beyond reach of the General Assembly, is questionable. Objections stems from the likelihood that Arkansas may not remain a one-party state, as some authors of Amendment 29 tacitly assumed. Some profess to see national trends toward an alignment that may divide the electorate along political lines definitely liberal and conservative. Should this trend, or current frictions within ranks of the majority party in the southern states, usher in a two-party system in Arkansas, the constitutional requirement of majority nominations would invoke criticism. Meanwhile, the Republican Party, or any minority, is forced by Amendment 29 to select nominees either at party convention or to incur expense of two primaries.
>
> The principle of majority rule, on the other hand, is a bed-rock ingredient of democratic political philosophy. The principle, in one-party states, is ample support for the view that constitutional law should sanction majority nominations. The General Assembly may not amend the requirement of nomination by majority vote; in enabling acts it may exercise broad discretion in giving form and effect to the constitutional mandate.

Plaintiffs maintain, as pointed out above, that the primary runoff laws of Arkansas "were enacted and have been maintained for racially discriminatory reasons." Plaintiffs' Pretrial Brief, p. 2. Plaintiffs acknowledge, as they must, that during the period discussed above, when such laws came

into being in Arkansas, black citizens had already been essentially disenfranchised and removed from any participation in Democratic primaries. And, since nomination in Democratic primaries at that time was tantamount to election, blacks were essentially excluded from any meaningful participation in the entire political life of the state. "All white" primaries and the poll tax had reduced black voter registration, according to one authority, to 1.5 per cent in 1940. See, "Runoff Primaries and Black Political Influence," by Harold W. Stanley, p. 270.

The Court is convinced that there was no racially discriminatory purpose or intent in the primary runoff enactments. Nor could those laws at that time have had any discriminatory racial effect since blacks could not run for office, vote, or otherwise participate in Democratic primaries. But plaintiffs go on to argue that such laws have been maintained for racially discriminatory purposes. After hearing all of the evidence, the Court is convinced that this

is simply not so. The actual purpose was the stated purpose, to wit: to insure that no one was nominated as a candidate of the Democratic Party who had not received a majority of the votes cast. This is not a tenuous policy to conceal some racial animus but, rather, a "bedrock ingredient of democratic political philosophy." See discussion of Section 2 of the Civil Rights Act of 1965, infra.

Plaintiffs rely principally upon the circumstances surrounding the enactment in 1983 of Section 7-5-106, Ark. Stat. (1987) (which establishes the runoff requirement for candidates for municipal and county offices in general elections) as evidence of legislative intent to maintain the runoff requirement in primary elections for racially discriminatory reasons. They point out that this enactment followed directly upon the election of a black as mayor of West Memphis in a plurality election. Their reliance upon such evidence is misplaced for several reasons. First, that evidence falls far short of convincing the Court that the

overall legislative intent for the enactment of Section 7-5-106 was tainted by racially discriminatory motives. Second, the "nature of the beast" is quite different in the two cases: section 7-7-202 applies to party conducted primary elections across the board, that is, in all cases where a political party chooses to nominate by the use of that vehicle instead of by party conventions; section 7-5-106 applies to state-conducted general elections for two specific type of offices only, i.e., municipal and local offices. Section 7-7-202 deals with one of the methods political parties may use to determine who their nominees will be in the general election. Section 7-5-106 deals with the manner in which persons are elected to certain municipal and local offices. Different motives and intents obviously may come into play in these two differing situations.[1] Third, plaintiffs fail to accept that the majority

[1] In the hierarchy of the fundamental values of a democratic state, the manner in which political parties choose to identify their nominees for public office positions is not as important as the procedures used to control the actual election of such public officers. Using this reasoning, courts might

vote requirement in cases where primaries are used by political parties to nominate their candidates is embodied in the Constitution of the State of Arkansas.

Amendment 29 was adopted by vote of the people in 1938. That amendment, it should be recalled, was initiated by the people through petitions--not by the legislature. An effort to repeal it, Amendment 30 in 1940, as proposed by the Arkansas legislature, was resoundly defeated by the popular vote. So far as the Court is aware the issue has not been put to a popular vote since the defeat of Amendment 30. Therefore, the issue is beyond direct legislative reach. And

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feel less restraint in interfering with the nominating primary process than with the general election process. It is true that, in Arkansas, political parties are not required to use open primaries to determine their nominees. They may use the convention process. So ruling that a primary runoff law was bad would not be as threatening to the basic democratic structure of government as would a like ruling with respect to a general election runoff law. (Indeed, under our republican form of government, the concept of plurality rule for general elections might itself be suspect constitutionally.) But the significance is immense in either situation. And in one-party states, the primary elections may be the critical ones in determining who shall ultimately be elected.

the intent of the legislature is not in all cases the same as the intent of the people, as has been frequently demonstrated, and as was in fact demonstrated in this particular case when the legislature proposed Amendment 30 which, if enacted, would have abolished the runoff requirement in primary elections.

Indeed, it must be recalled that the repeal of the run-off statute in 1935 is what prompted the movement to embody the majority vote requirement in the Constitution where it would be beyond legislative control. And there is absolutely nothing in this record to suggest that the voters who caused the adoption of Amendment 29 and later rejected an amendment which would have repealed Amendment 29 had any racial animus in mind. The history is clear: race was not a factor. In fact, it has been suggested that fear of the power of the Ku Klux Klan may have been a motivating factor for some. But the perceived perversion of democratic principles (where plurality elections were permitted) was the overriding motivating factor.

Subsequent to the enactment of Amendment 29 and the failure of proposed Amendment 30 (to repeal Amendment 29), the people have had no further voting opportunity to reconsider the issue. So the majority vote runoff system in primary elections has been the settled practice in this state for over 50 years. The legislature, by its own actions, has no power to repeal Amendment 29. It cannot thus be contended that the General Assembly has retained or maintained the majority-vote runoff requirement for discriminatory reasons. And, although the legislature has recently endorsed the runoff principle for use in connection with certain general election contests, its motive, as discussed above, was not, overall, tainted by racial considerations. The fact that a handful of legislators, in 1983 may have been motivated by such considerations is beside the point. We are to deal with the overall legislative intent.

It is interesting to compare the evidence pertaining to legislative intent in this case with that in Butts v. City of New

York, 779 F.2d 141 (2d Cir. 1985). There, the runoff proposal opponents argued in the legislature that the proposal would have the effect of preventing blacks and Hispanics from ever electing their own candidates. And it was argued that the 40% threshold was chosen because it was just above the combined population of blacks and Hispanics. On the basis of such evidence and arguments, U.S. District Judge Brieant concluded that the act was passed for the purpose of diminishing minority participation in the political process. The Court of Appeals held that Judge Brieant's finding of discriminatory intent was clearly erroneous. A portion of the Circuit Court's analysis and reasoning is pertinent here:

> Judge Brieant placed particular emphasis on the remarks of two black Senators, Galiber and Stewart. Senator Galiber argued that the run-off bill would prevent a minority candidate from winning a city-wide election through a plurality and, consequently, from ever winning such an office. Senator Stewart opposed the law on the same grounds, arguing that the run-off was bound to degenerate into a race-based choice, and would thus extinguish the possibility of a black/Hispanic coalition candidate winning by plurality. He added that, in his view, the 40%

threshold had been chosen because the black and Hispanic combined population then comprised 30% of New York City, and thus the higher figure shielded the offices from a minority coalition candidate.

We find more persuasive the contrary evidence in the record provided by the remarks of the bill's proponents. First, responding to Senator Galiber, Senator Bloom stated that the purpose of the run-off was to bolster the weakening party system by ensuring that the candidate who emerged from the primary truly represented "the thinking of the majority." The court mistakenly characterized this statement as probative of racial motivation, interpreting the word "majority" to mean "racial majority." This is clearly not what Senator Bloom meant. His statements elsewhere in the debate clarify his view that the bill was not intended to and would not have the effect of weakening the voting power of racial--as opposed to ideological--minorities. Second, responding to Senator Stewart, Senator Brydges reiterated that the purpose of the bill was to ensure representation for the ideological majorities of political parties, and emphasized his opinion and hope that a minority candidate would one day profit from the run-off law.

The members of the Senate overwhelmingly passed the bill. The results in the Assembly--where the bill was virtually uncontested--were the same, with all 5 minority Assemblymen present voting in favor of the law. The district court, oddly, found this support, probative of racial animus in light of the evidence before the legislature that the law would be costly and logistically difficult to implement. The district court made no mention of the support that the bill received

from Senator Garcia (a Hispanic), and Garcia's statement during the debate that Badillo supported the bill, even though this evidence strongly undercuts the notion that § 6-162 was intended as an "anti-Badillo" measure. The court cited the "alacrity" with which the bill moved through the Assembly and Senate (two months), and Governor Rockefeller's quick approval, as somehow probative of the discriminatory intent behind the bill.

It is venerable principle that the legislature is presumed to act constitutionally. See, e.g., Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187, 191, 79 L.Ed. 281 (1934); Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 135-42 (1893). This rule was recently reaffirmed in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), where the Court noted that courts should be "reluctant to attribute unconstitutional motives to the state, particularly where a plausible [constitutional] purpose may be discovered from the face of the statute." Id. at 394-95, 103 S.Ct. at 3066. Despite this, in analyzing § 6-162, the district court minimized evidence probative of the legitimacy of the law, and as a result drew all inferences against its constitutionality. The events leading up to passage of the bill clearly support an inference of legitimate motive. The Proccacino nomination badly hurt the Democratic Party in New York City, and such fluke results were likely to recur as the party system further deteriorated and a broader field of candidates emerged. The application of § 6-162 solely to citywide offices in New York speaks primarily to the ideological diversity within the City and the importance of those offices.

The 40% threshold, which Judge Brieant called "diabolic," was obviously chosen because Proccacino received 33% of the vote in 1969, not because of the minority population figures in New York. Finally, the speed with which the bill passed both houses demonstrates its broad-based support rather than any "nefarious" motives; this broad support is also evident from the strong minority legislative vote in favor of the bill.

At its core, the district court's holding seems to rest primarily on the statements in debate, of the bill's opponents. The Supreme Court has, however, repeatedly cautioned--in the analogous context of statutory construction--against placing too much emphasis on the contemporaneous views of a bill's opponents. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n. 24, 96 S.Ct. 1375, 1386 n. 24, 47 L.Ed.2d 668 (1976); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95, 71 S.Ct. 745, 750-51, 95 L.Ed. 1035 (1951). Rather, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros., 341 U.S. at 394-95, 71 S.Ct. at 750-51; see N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964). And, in fact, the legislative debates surrounding § 6-162 are filled with lengthy speeches by the law's proponents attesting to its legitimate ideological purpose; there is not a single remark by any proponent of the legislation that so much as hints at any improper purpose. We conclude that the speculations and accusations of the run-off law's few opponents simply do not support an inference of the kind of racial animus discussed in, for example, Arlington Heights, supra, 429 U.S. at 265-

68, 97 S.Ct. at 563-65.

> Accordingly, we hold that the finding of discriminatory intent in the passage of § 6-162 is clearly erroneous. New York City's run-off law does not violate the Equal Protection Clause.

So here the Court must start with the presumption that the legislature acts properly and constitutionally. And it should be reluctant to attribute unconstitutional motives to the state, "particularly where plausible [constitutional] purpose may be discovered from the face of the statute." And we are cautioned against placing too much emphasis upon the contemporaneous views of the bill's opponents. Rather, we should look to the statements of the sponsors if the meaning or intent is in doubt. Following such guidance here, we can only conclude that the plaintiffs have completely failed in their attempt to show that the challenged primary runoff provisions were enacted or maintained for any racially discriminatory purpose.

The Court has already described the racial balance in

to Marianna in Lee County developed in the case of Campbell v. Lee County Election Commission and the census data in this record.

The Court finds that the black citizens of Phillips County do not still face harassment or intimidation in registering, or in voting, or in running for office. The location of polling places is always a difficult problem. Blacks on the average, being poorer and having less access to transportation, may be said to experience more difficulty on a statistical basis in getting to the polls. Of course, poor whites face the same problem. The Court does not find that the location of the polls as described in the evidence constitutes a significant barrier to black or white participation given even minimal motivation to so participate. The evidence indicates that the black leadership in this area is highly organized and motivated during the elections and does attempt to, and does, provide transportation for those blacks supporting that group's objectives who request such

assistance. See further discussion infra.

The laws relating to the assistance of persons at the polling booths have been liberalized. Although there has been some tightening up on the requirements for absentee voting, the objective has been to reduce the abuse of that mechanism which is in the interest of both blacks and whites who favor honest elections. As stated by Professor Stanley in "Runoff Primaries and Black Political Influences,"

> Absentee ballot abuse can reduce the chances for ousting incumbents.

It has occurred to the Court that the principal problem is one of education and communication. We are not dealing here with an at-large voting system or racial gerrymandering. So, where the black voting age population and the white voting age population are approximately equal and there are no legally significant state-imposed barriers to full participation, the question arises on the front end whether there can be any legal predicate for an attack, such as this,

the 75 Arkansas counties. Only 16 of those counties have black populations in excess of 30%. Statewide, the black population is 16%. One can see that in a great majority of the counties the thought or idea that a runoff mechanism might have racial significance or consequences would simply not occur to anyone. And likewise it would have no such significance to the legislators representing such counties.

The evidence in this case and the literature on the subject reveal that the absence of runoff requirements in the law has not generally come to the citizen's or legislator's attention until some bizarre result occurs in an election. Most often it has occurred when some candidate getting 30 to 40 percent of the vote has ended up "nominated" or "elected." See, e.g., the discussion of Mr. Henry Alexander's article, "The Double Primary," supra.[2] Whenever a person is elected

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[2] The Court views it as "sort of" like our attitude toward the Electoral College system. So long as the person elected usually or almost always has a majority of the popular vote, people do not get too agitated about that system.

by a plurality vote in this country, there appears to be a tendency for the citizenry, and their legislative representatives, to become agitated and concerned. This is understandable because Americans have traditionally been schooled in the notion of majority rule.[3] The theory is: a majority vote gives validation and credibility and invites acceptance; a plurality vote tends to lead to lack of acceptance and instability.

The concept of "majority-rule" dominates our national mind. But the problem is not confined to America. Many other democracies have had to deal with it. Recently, the French had a "run-off" election. The situation in South Korea appears to be that the present governing party did not get a majority of the votes in the most recent election. Their electoral rules are being challenged. Mr. Allende is said to

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[3] The framers of our Constitution, while acknowledging this principle, also understood that a majority could run roughshod over a minority. The Bill of Rights was their answer to the prospect of the tyranny of the majority.

have been the only Marxist who was ever elected the head of a democratic state. He received between 36 and 37 percent of the vote. A coup occurred. President Allende was murdered. Democracy has yet to return to Chile. Would a runoff requirement have preserved democracy there? One can only speculate. But the point is: there are compelling, obvious reasons, completely unrelated to race, for states to opt for runoff elections.

The plaintiffs, having failed to establish their constitutional challenges to the Arkansas primary runoff requirements, their claims in that regard will be dismissed.

PLAINTIFFS' CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965.

Section 1973, U.S.C. 42 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this

title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The quoted language reflects the 1982 amendment which Congress made to section 2 of the Voting Rights Act of 1965. By virtue of this amendment, Congress made it clear that plaintiffs need not show that the challenged voting practice or procedure was the product of purposeful discrimination. The Senate Report lists several "typical factors" that may serve to show a violation of the act. Those factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the

upon a primary runoff mechanism.

Indeed, it occurs to the Court that, absent state-created barriers to registering and voting, there should be both some low threshold, as well as some high threshold of minority voting age population needed in order to trigger a consideration of any argument that a runoff device results in a denial or an abridgement of the right of any citizen to vote or to participate in the political processes of the state. It could readily be argued that where the minority voting age population was below, say, 20 percent or above, say, 45 percent, the issue would simply be foreclosed as a matter of law. Indeed, this argument was alluded to by the defendants, Governor Bill Clinton and Secretary of State Bill McCuen, in support of their motion for summary judgment in this case. Those then-defendants argued that the plaintiffs' attempt "to invalidate the majority vote requirement for all elections in the state of Arkansas is unnecessary and improper." P. 4, Brief in Support of Motion for Summary Judgment. They

argued that the plaintiffs had presented no facts "which indicate that these requirements are discriminatory in statewide, congressional, district, or in county or local elections outside of Phillips County. They were, in effect, contending for a "low threshold" requirement. The Governor and Secretary of State argue:

> Many countries and municipalities in Arkansas are all or virtually all white. It is definitionally impossible to have any intent to discriminate against blacks in an election in an all white county or municipality. Likewise, with regard to state elections, it is definitionally impossible to assume a discriminatory intent or effect when only sixteen percent of the population, according to census statistics, is black. Even in a worse case scenario, under which there is absolute rigid and total racial block voting in State elections, eliminating the majority vote requirement would have no effect in helping blacks elect candidates of their choice because their portion of the population is simply too small.

And, as indicated above, when the voting age population of blacks approaches equality with the voting age population of whites and the evidence shows, in addition, a consistent pattern of "crossover" votes in actual elections, which,

members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practice or procedures that may enhance the opportunity for discrimination against the minority;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 177, 206, 207.

The most important U.S. Supreme Court case dealing with this issue is Thornburg v. Gingles, 478 U.S. 30, 34-37, 106 S.Ct. 2752, 2758-59, 92 L.Ed.2d 25, 37 (1986). That case involved a challenge to the use of multimember state legislative districts. In the context of that issue the Court held that the most important of the Senate Report factors were the "extent to which members of the minority group had been elected to public office in the jurisdiction" and the "extent to which voting in the elections in the state or political subdivision is racially polarized." Whether those factors would be emphasized in dealing with a challenge to a runoff requirement is doubtful. But Gingles does make it clear that in challenges under section 1973 the court should

conduct an intensely fact-specific appraisal. As stated in the plaintiffs' pretrial brief, "no court has yet developed a Gingles-like distillation for majority-vote cases." Plaintiffs' Pretrial Brief p. 5. Plaintiffs attempt to treat the runoff requirement as they would a "vote-dilution" case. And they maintain that all they need to show is that there is some causal relationship between the runoff requirement and the lack of "minority electoral success" and that voting in the challenged area is racially polarized. This Court does not agree. Plaintiffs must show a violation of Section 1973, i.e., that the runoff procedure was imposed or applied by the State of Arkansas in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color. But the Court agrees that plaintiffs must show, among other things, some causal connection between the runoff requirement and the lack of "minority electoral success." Their evidence has failed to so convince the Court.

The premise of this whole attack is that blacks form a

minority of the potential voters in Phillips County. The basic statistical data introduced into evidence may not support that assumption. Furthermore, at least since 1965, there have been no legal barriers to black participation in the political processes of the state. Nevertheless, the contention is made that because of the history of segregation and the socio-economic status of the blacks compared to whites in this area, it is, as a practical matter, more difficult for blacks to exercise their legal rights. More about that below.

The Court notes that in recent years there has been a much greater effort to register blacks. The county clerks in both Lee and Phillips Counties, for instance, have deputized many volunteers to assist in the registration efforts. The great bulk of these volunteers have been black and the great majority of those whom they have registered have been black. There is some evidence that the registration level of voting age blacks in some of the contested areas is equal to, or approaching, that of voting age whites. See statistics relating

although small percentagewise, are sufficient to "bridge the gap," the basic assumption used to challenge runoff provisions appears to be undermined. In this connection, the Court notes the language of the Court of Appeals in Perkins v. City of West Helena, 675 F.2d 201 (8th Cir. 1982), cited to this Court in plaintiffs' pretrial brief:

> [R]acial block voting prevails in West Helena. Almost without exception, black candidates have received more than 90% of the vote in the identifiable "black voting areas" and only 15 and 24 percent of the vote in "white voting areas."

p. 213. The evidence in this case likewise shows a consistent minimum "cross-over" vote. It is the Court's view that we do not have here the minimal disparities necessary to establish either whites or blacks as a "minority" of the voting age population. Those populations are for practical purposes equal.

Beyond the question of whether blacks in the instant case constitute a cohesive "minority" of the size necessary to trigger an inquiry into the question whether the primary

runoff law might discriminate against blacks, there is the further question of whether this particular election device, e.g., the primary runoff here, has a consistent effect of discriminating against the black minority. For the purpose of this discussion we might assume that the political unit involved has a voting age population of 60 percent white and 40 percent black.

Professor Harold W. Stanley has written persuasively on this issue. He cites the arguments made by the plaintiffs here:

> Without the runoff's majority vote requirement, black candidates in minority black districts could gain the Democratic nomination--drawing on solid black voting support, while two or more white candidates split the white vote. This would produce more black nominees, which would mean more black elected officials, because these black Democratic nominees should enjoy--thanks to the party label--sufficient general election support from Democratic whites for victory. When a sufficient share of whites back black candidates, these candidates can garner a majority of the vote for the nomination and the election. Critics contend that, when whites do not prove sufficiently willing to back black candidates, the runoff's majority vote requirement works against the nomination and--

thus--the election of blacks.

Professor Stanley then proceeds to address the logic and the practicality of the claims that runoffs disadvantage blacks. He states:

> [W]hether runoffs are racially discriminatory has yet to be determined. Firm evidence to address critical questions is lacking. . . .

Nevertheless, he concludes that the available evidence casts doubt on such claims. After citing the election of Doug Wilder as Virginia's Lt. Governor and the elections of Harold Washington as Mayor of Chicago, he observes:

> the levels of support that they secured in the general election--even if somewhat reduced--would have allowed them to succeed in a primary runoff.

He then makes the following analysis:

> For the South in general, if we assume that a plurality-win primary system would mean more blacks as Democratic nominees, we could not confidently anticipate the election of more black officials. The appeal of Republicans to white southerners, the reluctance of some southern whites to vote for black candidates, and the relative size of the black vote combine to check such predictions. Gone are the days of the solid South:

The Democratic nomination is no longer tantamount to election. Even for electoral contests between white candidates, Democratic whites voting for Republicans have characterized the recent South. Where electoral politics is racially charged, the added stimulus of race could make such defections even more common. In majority nonblack areas, a black Democratic nominee can count on facing a white Republican candidate in the general election; indeed, the prospect of a black Democratic nominee gives additional encouragement to Republican candidacies. The lack of white support that makes it difficult for a black to gain a majority in a Democratic runoff in a majority nonblack district would work to favor Republican prospects--resulting in the defeat of the black candidate. Making southern whites choose between race and party when their party ties have considerably loosened might accelerate the decline of the Democrats--and promote Republican prospects to an extent that Republicans themselves have not yet managed. More generally, the nomination of splinter candidates could make the Republican alternative more attractive in the eyes of many. "No question," U.S. Representative Wyche Fowler (D-Ga.) said, "the best thing that could happen to the Republicans is the abolition of the runoff primary. It would build the Republican party overnight."

Southern blacks are the most loyal Democratic group, but they are too few to ensure victories in most southern electoral constituencies. An exact count of the black population for each southern election district is not available; but the political import of the black population can be gleaned from the distribution of

> southern blacks in states, congressional districts, counties, and cities (Table 14.1). Most southern blacks live in electoral districts less than 30 percent black. The prospects for general election majorities based primarily on black votes are restricted to very few southern districts. The distribution of the southern black population indicates that the election of black or black-backed candidates in most of the South hinges on biracial coalition politics.

Having concluded that the elimination of the runoff requirement would not likely produce more black elected officials, he asked whether its removal would produce more nominees. His answer is as follows:

> The likelihood of black nominees gaining a plurality of the primary vote in a crowded field seems enticing enough to encourage some to argue for ending the runoff. However, in majority black districts--as supporters of the runoff point out--the lack of a runoff might cause several black candidates to split the black vote and allow a white candidate to gain a plurality nomination. Thus, the runoff can protect and promote black political prospects in majority black districts. For this reason, voting rights litigators who are working to dismantle at-large election systems and replace them with single-member districts (some districts being majority black) find the emphasis on ending the runoff to be misplaced. Recent reapportionments have reduced the number of multimember districts--making more districts majority black. After reapportionment produced an increase in

> single-member districts (several with black majorities) the chairman of South Carolina's House black caucus noted. "Things have changed so that the runoff now can work in our favor."

His logic is supported by the evidence in this case. The blacks have a voting age population majority in some of the Justice of the Peace districts in Phillips County. If two or more blacks chose to run in the primary and only one white, then the same possibility, i.e., of a minority white plurality nominee, would occur.

The Court shares the doubts of others that runoff requirements have any identifiable racially discriminatory effects. It is one thing for the plaintiffs, Mr. and Mrs. Whitfield, to point out that, after their first primary elections, they would have been the Democratic Party's candidates in the general election if they had not had to face a runoff; it is quite another thing to state that, had there been no runoff provisions when they ran in the primary, they would have been the Democratic candidates for the particular offices they

were seeking. Once you change the rules, then a different dynamic obtains which has been described by Mr. Stanley in his article, "Runoff Primaries and Black Political Influence," which is discussed above.

It goes without saying that runoffs are of no importance if only two candidates are in the race. Putting aside the remote possibility of a tie vote, in that situation, the winner must gain majority support. So a plurality election system, where racial voting and racial polarization exist, will result in attempts to limit the number of candidates on one's own side and, at the same time, to attempt to increase the number of candidates on the opposition side.

How thin a reed are plaintiffs relying on! Rationality is not involved. Only happenstance. The idea is: Maybe the black community can agree on one candidate and somehow prevent other black candidates from filing while the white community does not respond in kind and therefore ends up with two or more white candidates in the race. This is not a

political theory or philosophy; it is gamesmanship, political Russian roulette; and it is based solely on race. Note Professor Stanley's comments on the studies of Bradley Canon,

> Ending the runoff accomplishes little, if political forces then tend to restrict contests to two candidates. Experience with single primary and runoff systems in the South and the Border South indicates that runoffs encourage multiple candidacies in the first primary, but that single primary systems work to limit the number of candidacies to two. This difference has political, rather than racial, roots--although racial considerations can reinforce the tendencies. Bradley Canon examined gubernatorial primaries, runoffs, and nominations in 16 southern and border-south states between 1932 and 1977: He found that, in the 10 states with runoffs, the top two candidates averaged 67 percent of the first primary vote; but that, in 6 states with single primaries, the top two candidates averaged 93 percent of the vote. In a runoff system, several candidates can enter the first primary and strive to qualify for the runoff; should they fail in that quest, they can productively bargain with the first- or second-place finisher to deliver support in the runoff. Under a single primary system, such bargaining takes place before the primary, as interested parties seek to line up behind a winner. The single primary system's tendency to limit contests to two serious candidates--in conjunction with the pressures provided by racial polarization--make it likely that a black candidate for the nomination would face a single white candidate.

> This matchup would produce defeat for the black candidate in election districts that are not winnable by a black in a runoff.

There is nothing in the evidence which supports the contention that the plaintiffs here would have been the nominees of the Democratic Party in the general election had they run in a single, plurality-win primary. Had there been a single primary, plurality-win law in effect, and this was known to all before the fact, one can only speculate as to what would have happened.

In addressing the prospects for black candidates, Professor Stanley observes:

> The willingness of some Democratic white voters to back Republican candidates and the reluctance of some to vote for black candidates would turn the elimination of the runoff into a recipe for reducing black political influence. Those pushing for abolition of the runoff assume that such white voters are unfit to shape the future of the Democratic Party. Yet, insofar as political parties are organizations held together by a desire to win elections (rather than mount losing crusades) current voter attitudes need to be worked with--not assumed away. Southern black voters are loyal Democratic, however, basing the party on such a loyal but limited constituency does not promise

success at the polls. Few southern Democratic elected officials have gained office without a sizeable share of white votes; most Republican officeholders have gained office with very few black votes. Outside majority black districts, black votes as the only source of support are seldom sufficient for election, but without black votes some Democrats would have lost. (Not even Jimmy Carter, when he was elected president over Ford, gained a majority of the popular vote among white southerners.)

For Democratic candidates, nomination rules that encourage the seeking of biracial support promote prospects for election. Retaining the runoff can lead to more black-white coalitions that back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization, lower Democratic chances of succeeding in the general election; and an acceleration of the movement of southern whites into the Republican party, as white voters and politically ambitious whites find the GOP an increasingly attractive alternative.

It is clear to the Court that a runoff requirement encourages candidates to seek biracial support. The runoff

requirement almost mandates consensus-seeking collaboration between whites and blacks within the Democratic Party. The elimination of the runoff requirement would not, in the opinion of the Court, reduce racial polarization, but would tend to reinforce that polarization. Issues and qualifications would tend to take a back seat to race. And, once a "no runoff" rule was established, the game of foreclosing legitimate opposition in the interest of racial solidarity would thrive alongside of the stalking horse phenomenon.

Professor Stanley analyzes recent southern gubernatorial elections to measure electoral responsiveness to the interests of blacks. He concludes that such responsiveness best characterizes the "post-Voting Rights Act South." He analyzes the elections between 1954 and 1965 on the one hand and those between 1966 and 1973 on the other. The data indicates that the responsiveness to black interests increased dramatically in the later period, essentially reversing the earlier tendency. He notes that the success of certain

strong segregationists did not mark the path by which later gubernatorial candidates would succeed.

> The strong segregationist victor in Arkansas in 1966 lost to a racially progressive Rockefeller in the general election. The next victorious Democratic governor and his successors reflected the progressive Rockefeller.

Professor Stanley compared the gains made by blacks in southern states without the runoff and those with the runoffs:

> In southern states without the runoff during this period--Virginia since 1970, and Tennessee--gains in the number of black elected officials and the increased black political influence generally did not surpass the gains recorded by states with runoffs. Such a comparison suggests that, in recent years, the runoff has not diluted the strength of the black vote. (emphasis added)

In his conclusion, Professor Stanley again asks if the runoff is "racially discriminatory." And he concludes "that the runoff is not racially discriminatory." He observes that:

> Abolishing the runoff now would ultimately result in few (if any) additional black Democratic nominees, few (if any) additional black elected officials--and more Republican victories. Such an outcome would serve to exclude black voters from more winning

coalitions--thereby reducing black political influence.

He even observes that in recent years the evidence suggests that the runoff "has promoted black influences:"

> Maintaining and maximizing black political influence requires removing the remaining racially discriminatory barriers that blacks face. As reports have noted, some southern blacks still face harassment and intimidation in registering, voting, and running for office; uncooperative or even hostile registration and polling officials depress the black vote; black access to the polls is made more difficult by the location of polling places and the lack of effective assistance at the polls; restrictive registration practices also affect whites, but--given the legacy of past educational and economic discrimination--such practices have a greater impact on blacks, limited access for black candidates to the white community--particularly, civic organizations and sources of campaign funds--can reduce chances of election; absentee ballot abuse can reduce the chances for ousting incumbents; and racial gerrymandering can carve bleak constituencies for black electoral prospects. The runoff does not deserve inclusion among lists of the barriers that deny blacks an equal opportunity to participate in the political process and to elect representatives of their choice. Consequently, drawing attention to the runoff diverts attention from the real problems.

Without adopting the rationale in the Butts case (i.e., that section 2 does not apply to majority vote requirements

when the election at issue is for a single office), the Court nevertheless does have serious doubts whether the run-off provision (at issue here), in the factual context revealed by the evidence, could, as a matter of law, be deemed to be a device capable of making the political processes leading to nomination less open to participation by blacks than to others or capable of resulting in blacks having less opportunity than others to participate in the political process and to elect representatives of their choice. In Phillips County, the black population constitutes approximately 53 percent of the total, and the voting age population of blacks is only marginally less than that of the whites. In Lee County, the situation is similar but blacks appear to be marginally a majority of the voting age population of that county. Although there is evidence of extreme racial polarization in voting in recent years, there is almost invariably a minimal "cross-over" of blacks for white candidates and whites for black candidates. We have a situation, therefore, in which one cannot readily

figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of Section 2 of the 1965 Voting Rights Act, as amended.

Even assuming that the population figures were such as would permit the plaintiffs here to challenge the primary runoff law, they have not proved or demonstrated by the evidence that such a provision, based on the totality of the circumstances revealed by the evidence in this case, has had, or has, the effect of discriminating against blacks or that there is any causal connection between the lack of black electoral success and the challenged runoff procedure.

THE ROLE OF THE SENATE REPORT
TYPICAL FACTORS.

One must understand the function and importance of the Senate's factors. The factual determination which the Court is called upon to make under section 1973(a) is whether the challenged practice is being applied by the state or

political subdivision "in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color ... as provided in subsection (b)." Subsection (b) states that a violation of subsection (a) is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a class of citizens protected by subsection a ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Subsection (a) therefore sets forth the general operative factual issue and subsection (b) a particular showing that will establish a violation of subsection (a). The Senate Report then brings the Court's attention to certain "typical factors" that may serve to show a violation of the Act.

It should be noted that subsection (b) does not invade the judicial fact finding function by compelling a violation-

violation of subsection (b). By contrast, a positive finding with respect to the various "typical factors" listed in the Senate Report will not automatically control the ultimate factual findings.

During the oral argument of this case, the Court observed that the evidentiary record made by the plaintiffs here in their attack upon the primary runoff statute would have been practically the same if the plaintiffs had been attacking a "plurality-win" provision of state law, i.e., if they were asking the Court to mandate a runoff requirement. In other words, let us assume that the controversy arose as a result of the outcome of a primary election in those J.P. districts in Phillips County in which blacks constitute a large majority of the voting age population. Let us assume that one white ran against two blacks and received 40 percent of the vote, whereas each of the blacks received 30 percent of the vote. The argument could then be made that the plurality-win practice or procedure discriminated against blacks

because it permitted a white to win without obtaining a majority of all of the votes cast. But the evidence presented would be practically the same as that presented in this challenge to the runoff procedure, at least with respect to the Senate Report "typical factors." The evidence would be the same with respect to the history of official discrimination; the extent to which voting is racially polarized; the extent to which blacks presently bear the effects of discrimination in such areas as education, employment and health which hindered their ability to participate effectively in the political process; the extent in which blacks have been elected to public office, etc.

Or let us assume that the attack is upon the use of popular elections for the selection of party nominees. Under the Arkansas Constitution, party nominees may be chosen by party conventions. So what if the procedure being attacked was the use of elections? Again, the proof would be essentially the same as it was in this case as far as the Senate

speak of the blacks or the whites as being the "minority" or the "majority."

The case, Campbell, et al. v. Lee County Election Committee, (No. H-C-86-48), which is still before the Court, involved a plan of reapportionment to produce equal single member districts. The black plaintiffs argued that they would need a voting age population of 60 percent or more in order to have a "safe" black district and any real opportunity of electing the representatives of their choice. In the absence of demonstrated barriers to full political participation by blacks in the electoral process, the court characterized such an argument as a racial slur against blacks. The Court discussed that view with counsel in this case.

Because of the circumstance that the voting age populations of blacks and whites in Phillips County is equal for practical purposes, the Court assumes that the petitioners are contending that, even where black voting populations equal or exceed white voting populations, blacks should

nevertheless be considered a "minority" because of the evidence that they have not participated in the past in the political processes of the county in as large a proportion as have whites. Again, the Court rejects such a view, believing it to be both unwarranted, contrary to law, and counterproductive.

We have placed our faith in the "one person, one vote" rule. At great danger do we suggest that the votes of one group should be weighed heavier than the votes of another group. Even where a lower socio-economic status can be traced to a history of racial discrimination, i.e., where blacks in a particular area are not as well educated or as well-off economically as whites, because of a history of discrimination, as here, courts would do well to go slow and to resist the temptation to make up for such past wrongs by tampering with the fundamental principles of our electoral system. At least this Court will refuse to do so, and it will rule, as a matter of law, that the undisputed population

conclusion with respect to subsection (a) upon the basis of a "showing" that does not logically support such a conclusion. If subsection (a) had not included the words "or abridgement," the situation might be otherwise because a showing that, because of the challenged procedure, blacks have" less opportunity to participate in the political process" and "to elect representatives of their choice" might not rationally and logically support the conclusion that the challenged practice or procedure is being applied by the political subdivision "in a manner that results in a denial ... of the right of any citizen to vote on account of race or color." (Emphasis supplied). But, if made, the showing specified in subsection (b), and the natural inferences arising from such showing, can be said to rationally and logically support the conclusion that the challenged procedure results in an "abridgement" of the right of any citizen to vote on account of race or color. By contrast, it cannot be said that a positive finding with respect to some, or all, of the "typical

factors" referred to in the Senate Report would automatically require the conclusion that subsection (a) had been violated. The "typical factor" findings, and the inferences arising therefrom, simply may not logically and rationally tell us anything about the effect of the challenged procedure. The Senate Report factors more logically support proof relating to "intent" issues than "cause and effects" issues.

Nevertheless, although Congress may not intrude upon the judicial fact finding functions, it may properly suggest that the Court consider certain factors before reaching its decision. But no particular number of "positive" findings with respect to such "typical factors" can dictate the ultimate factual finding required under section 1973(a). So the Senate Report "typical factors" do not have the same function as the finding identified in subsection (b). Subsection (b) states that a violation of subsection (a) "is established if ... it is shown ... etc." (Emphasis supplied) So if the showing described in subsection (b) is made, that, in itself, will "establish" a

factors are concerned. And the same arguments could be advanced against the use of elections as plaintiffs have used here in attacking the runoffs procedure.

But the Senate factors have never been considered a "magic bullet" which can put in jeopardy any electoral procedure, including elections themselves. No, the Court must still deal with the ultimate factual issues identified in subsections 1973(a) and (b).

With these thoughts in mind, let us go through, one by one, the "typical factors" listed in the Senate Report in the light of the evidence presented in this case. The first is:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

Arkansas, as well as all other southern states (and probably all northern states), has a long history of racial discrimination. That discrimination touched the right of

blacks to register, to vote, or otherwise to participate in the democratic process. So factor #1 is practically a "given," at least with respect to any southern state or any political subdivision of any southern state. The only question would be: when did this "official discrimination" end in the voting rights area?

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

The Court finds that there has been extreme racial polarization in voting in Phillips County, Arkansas, in recent years. Indeed, depending on how one interprets "racial polarization," and relying on judicial notice, there appears to have been "racial polarization" in each of the primary elections in which the Reverend Jesse Jackson has run in this nation so far during this spring. Without exception, 90 percent plus of the blacks participating have supported his candidacy and the great majority of whites have supported white candidates.

Dr. Richard Engstrom testified concerning this subject. He analyzed each county-wide race in Phillips County in which both black and white candidates competed since the year 1984. He used two methods: (1) the "extreme case" (or homogeneous precinct) analysis and (2) bivariate ecological regression. He found that black voters have overwhelmingly supported black candidates while white voters have overwhelmingly voted for white candidates. In 10 of the 14 contests, he found that over 80 percent of the black voters voted for the black candidate. And in all 14, a clear majority of black voters preferred the black candidate. Conversely, in 8 of the 10 contests, he was able to analyze for "white precincts," less than 10 percent of the white voters voted for the black candidates and in the other two, less than 15 percent of the white voters voted for black candidates. These figures were derived from using the "extreme case" procedure. Using the weighted double racial regressions, Dr. Engstrom found polarization to be even more striking. It was his

opinion that in 11 of the 15 contests, over 90 percent of black voters preferred the black candidate and in the other 4, an overwhelming majority of black voters are estimated to have preferred the black candidate. At the same time, in 11 of the 15 contests, the regressions estimated that not a single white voter voted for the black candidate. In the other 4, whites' support was estimated at less than 10 percent.

The Court relies more heavily on the raw figures introduced into evidence. Based on all the evidence, the Court finds strong polarization in line with the factual statements made in the Court's opinion stated above. That is, despite the polarization, there was consistently a "cross-over" vote on each side sufficient to create the possibility of uncertainty in the outcome. So, on the basis of judicial notice and the evidence actually introduced, the plaintiffs have satisfied the Court that there is severe racial polarization in the elections in Phillips County.

3. The extent to which the state or political

subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority.

It is interesting to note that the U.S. Senate apparently has suggested that "majority" voting is a procedure that "may enhance the opportunity for discrimination." That is far from clear to the Court based upon the evidence and authorities it has reviewed. Nevertheless, yes, the state has imposed upon Phillips County the "majority vote requirement" in primary elections. The Court does not find that the county has, in the recent past, used any of the other "discrimination-enhancing" voting practices mentioned.

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

There was no evidence upon this point.

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in

the political process.

This is also a "given" for the state of Arkansas and Phillips County and probably for every other political subdivision in the nation. But the effects are more devastating in Phillips County than in other places because of the dire economic circumstances that have developed in that area of the state over the past decade. Although the Court is finding that blacks still bear the effects of discrimination in such areas as education, employment, and health, nevertheless, the Court also finds that those effects should not hinder their ability to participate effectively and equally in the political process. The Court also notes that typical factor #5 refers to the "ability to participate" rather than "opportunity" to participate as stated in the statute. The statutory language, not being ambiguous, controls. The effects of discrimination referred to do not, in any legally significant way, hinder the "opportunity" or, indeed, the ability of blacks to participate effectively in the political process.

Because there are no legal barriers remaining to the opportunity of blacks to participate in the electoral process, plaintiffs have naturally emphasized the "socio-economic" factors. Considering the nature of our nation's political and economic system, one must move with care in this area.

There are certain truisms about the participation of Americans in elections. It is said that the young, the poor, and the uneducated do not participate in the same proportions as the older citizens, the rich, or the well educated. These considerations are, by definition, race neutral. Although it may be that poor blacks, say, do not participate to the same degree as equally poor whites, the record is silent on this point.

Viewing from a larger perspective, the participation of qualified American citizens in elections is abysmally and disgracefully low compared with that of almost any other democratic nation on the face of the earth. So, regardless of age, regardless of economic status, regardless of education,

regardless of health, our performance, as rated, for instance, by the percentage of those who actually vote in presidential elections, is very poor. The other side of that coin is that we as a nation have not chosen to require or coerce participation or to penalize non-participation. Indeed, it is not clear that Congress has the power under our Constitution to mandate participation. In any event, it has not chosen to attempt to compel participation or to penalize non-participation.

Some argue that American citizens "vote" when they choose not to vote--that the failure to go to the polls is a rational expression of political choice. Although that might be true in a small number of cases, the Court suspects that the lack of education, awareness, and interest--or a feeling of estrangement, frustration, futility or ennui--are the more likely bases for non-participation.

The point is that there must be some minimum motivation, some personal goal, before a citizen will take the trouble to register, to learn about the issues and candidates at

hand, and to vote.

Plaintiffs have emphasized the disparity between the percentage of blacks as compared to whites who have telephones or automobiles. They point to data showing that in the Phillips County area, 30 percent of black homes have no telephone and 42 percent of black households have no automobile. And they can demonstrate that not having a telephone or an automobile makes it more difficult and less convenient for a citizen to qualify for, and to exercise, his or her voting rights. The tricky words are "difficult" and "inconvenient." So far, the state has left it to the political parties, their adherents, and those seeking nomination in partisan primary elections to motivate, to communicate with, and to assist those whom they wish to participate in such elections. The state, or political subdivision involved, has no role in this regard. And neither the Constitution nor the Voting Rights Act requires political parties to contact prospective individual voters, urge their participation, or

provide transportation for those potential voters. But the law does require the absence of legal barriers. It also requires that no procedure operate to deprive any citizen of the right to vote, or to deny to any citizen the equal opportunity to participate in the political processes of the community. But ordinary inconveniences such as one might experience if he wished to go to the doctor's office or to the post office or the general store should not be deemed to constitute legal barriers simply because the objective is to get to the voting place. The value one places on one's right to vote will be reflected in the difficulties and inconveniences overcome in exercising that right.

One of the few physical barriers which the plaintiffs emphasized in this case was the location of the polling places. The plaintiffs have suggested that many of the voting precincts could be located in places more convenient to the black voters. The use of black churches was suggested. There was no persuasive evidence that the polling places in

1987 in Phillips County were established to discourage voting by blacks. Mostly they appear to be established by inertia--the choices in one election being followed in the next. The low level of participation cannot be traced to this circumstance. This is not to say that improvement could not be made in this regard.

But let us assume for a moment that the location of the polling places in the primary elections in Phillips County did have the effect of making it more difficult for blacks than whites to participate in the political processes. What does that tell us about the effect of runoff elections? Nothing. If the culprit is the practice or manner of locating polling places, should not that, then, be the practice that is attacked?

6. Whether political campaigns have been characterized by overt or subtle racial appeals.

In their Pre-Trial Brief, plaintiffs state: "While recent campaigns in Phillips County have not been characterized by overt racial appeals, plaintiffs will present evidence of the

central role race plays in Phillips County politics." The Court does not find evidence of significant, overt or subtle racial appeals, but accepts that those participating in the electoral process in Phillips County in recent years have more or less come to accept race as playing a central role in that county's politics. This is not to assess responsibility for that unhealthy situation, but race has frequently dominated over qualifications and issues. It is the Court's belief and hope that this is a transient phenomenon on the road to a more rational approach to political participation.

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

No black candidate has been elected to any county-wide office or to any state legislative office from Phillips County. One black candidate has been elected to office from a predominantly white jurisdiction in a head-to-head race. Within the county, blacks have won several Justice of the Peace elections (a county legislative office) in single member

district contests.

The Senate Report, in addition to the seven typical factors, mentions two additional factors, to wit:

> Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

There was not much evidence pertaining to the responsiveness on the part of elected officials "to the particularized needs" of blacks. The Court has already noted the comments of Mr. Stanley on the great increase in such responsiveness in recent years based upon his study of southern gubernatorial contests.

Finally we come to whether the policy underlying the state's use of the runoff requirement is "tenuous."

The plaintiffs point out that only ten states have majority-vote requirements and most of them are in the south. Although plaintiffs acknowledge, as they must, the history of

the primary runoff requirement, they state that Arkansas did not seek to impose a majority-vote requirement in general elections until 1969, "during a period of growing black activity." Their claim is that this first attempt, and subsequent attempts which culminated in 1983 with the passage of section 7-5-106, were in part "responses to the perception that a plurality-win system allowed black voters to exercise significant influence in the political process at the state level and provided them with a realistic opportunity to elect black candidates at the local level." See plaintiff's Pretrial Brief, p. 14. As pointed out in the discussion above, the plaintiffs' evidence simply does not establish that which is asserted in the brief.

We are dealing here with the very heart of our political system.

What are the policies underlying the primary run-off laws and Amendment 29 to the Arkansas Constitution? It must be assumed that the Democrats who overwhelmingly

controlled the state General Assembly (our legislature) in the past, and still do today, believe their party should adhere to certain principles. Majority-rule is one of those principles. And that principle has had overwhelming, popular support when it has been on the ballot in Arkansas. But equally important are the reasons stated by Professor Stanley which we repeat here:

> For Democratic candidates, nomination rules that encourage the seeking of biracial support promote prospects for election. Retaining the runoff can lead to more black-white coalitions that back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization, lower Democratic chances of succeeding in the general election; and an acceleration of the movement of southern whites into the Republican party, as white voters and politically ambitious whites find the GOP an increasingly attractive alternative.

Each party has an objective of breaking down harmful divisions among its supporters. The evidence suggests that plurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built.

Everyone involved in this lawsuit agrees that racial polarization in voting, i.e., voting for someone simply because of his or her race, is bad. Everyone agrees that we look forward to the day when the qualifications of the candidates, their principles, programs and policies and their positions on the issues will dominate political debate.

The Court looks on the current malaise in Phillips County as a temporary phenomenon that will, over a relative short time, pass. The Court is convinced that the elimination of the run-off would tend to perpetuate racial polarization and bloc-voting. The existence of the run-off provision has the opposite tendency. The state and party policy behind the

primary run-off laws is, therefore not tenuous but, to the contrary, strong, laudable, reasonable and fair to all.

Having reviewed the Senate Report factors and some of the proof relating thereto, the Court must determine whether its positive findings with respect to many of those factors make it more probably true than not true that the challenged run-off provision makes the political processes not "equally open to participation" by blacks in that blacks have "less opportunity than whites to participate in the political process and to elect representatives of their choice."

It should be apparent by now that most of the positive findings with respect to the Senate Report factors have no tendency to prove, or disprove, that proposition. The truth is that focusing on some of those factors serves more as a distraction than a useful tool for evaluating the cause and effect operation of the challenged runoff laws.

CONCLUSIONS

This Court is not denying plaintiffs relief because it

hopes and believes that the normal democratic processes of give and take will, over time, move Phillips County and the other Delta counties beyond "race politics," although that, indeed, is its hope and belief. It is denying plaintiffs relief because they have failed to establish either the constitutional claim or their statutory claim. They have failed to prove that the primary runoff laws of the state of Arkansas were enacted or maintained for any racially discriminatory purpose, and they have failed to convince the Court that Section 2 applies to such runoff provisions given the demographics of the area and the manner in which runoffs operate. And, finally, assuming Section 2 would apply to runoffs in such circumstances, the proof does not sustain plaintiffs' contention that the challenged provisions result in plaintiffs' and other blacks' having less opportunity than white citizens to participate in the political process or to elect candidates of their choice. Their complaint will, therefore, be dismissed.

ORDER DISMISSING THE GOVERNOR AND SECRETARY OF STATE AS DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, *et al.*,	:	
Plaintiffs,	:	
v.	:	Case No. H-C-86-47
Honorable Bill Clinton, *et al.*,	:	
Defendants.	:	

ORDER

Pursuant to the telephone conferences on March 1, 1988 and March 4, 1988 the Court rules as follows:

1. The plaintiffs' claim challenging the Arkansas general election statute, Ark. Code Ann. §7-5-106 is dismissed due to plaintiff's failure to join the Phillips County Election Commission, an indispensable party.

2. That the defendant class of county boards of

election commissioners of which the Phillips County Board of Election Commissioners was representative, will be decertified.

3. That the motion for summary judgment filed by separate defendants, Governor Bill Clinton and Secretary of State McCuen, is granted on the ground that they are not necessary parties and that no claim of wrongdoing has appropriately been asserted against those defendants. Accordingly, those defendants are dismissed.

4. That defendant Phillips County Democratic Committee and the Phillips County Republican Committee be, and they are hereby, appointed as the named representatives on behalf of the following defendants' class: all political parties' county committees in the State of Arkansas.

5. That the named defendants in this action are: The Democratic Party of the State of Arkansas, The

State of Arkansas Democratic Central Committee, The Phillips County Democratic Central Committee, and the Phillips County Republican Committee. As stated above, the Phillips County Democratic Committee and the Phillips County Republican Committee are appointed as the named representatives on behalf of all political parties' county committees in the State of Arkansas.

6. That Mr. Tim Humphries will continue as counsel for the above defendants.

It is so ORDERED this 4th day of March, 1988.

/S/
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 59 and/or 79(a) on 3/7/88 bw

RELEVANT PORTIONS OF THE DISTRICT COURT'S ORAL RULINGS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, et al.,	:	
	:	
Plaintiffs,	:	No. H-C-86-47
	:	
v.	:	Little Rock, Arkansas
	:	March 4, 1988
Bill Clinton, et al.,	:	9:00 A.M.
	:	
Defendants.	:	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE G. THOMAS EISELE,
United States District Court

APPEARANCES:

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PROCEEDINGS

* * * * *

THE COURT: We are back in touch. The plaintiffs, of course, were asking the Court to reconsider its ruling on the standing or ripeness with respect to their proposed challenge to the general election run-off law and we have looked at some of the cases and I have had some second thoughts about it. But I note that even if I were to reverse my view on that, as far as just standing or ripeness is concerned, the necessary parties to raise that particular issue are not before the Court if I'm right in my statement which I previously made that the file does not reflect that the

Phillips County Board of Election Commissioners was ever served, nor has it ever entered its appearance or filed any response voluntarily in this case.

So, we have essentially the Democratic party and the Republican party people who are necessary of course to challenge the primary run-off statute. But we do not have the appropriate or proper or necessary parties, it seems to me, to challenge the general election run-off.

Furthermore, again I get back to this question of standing and ripeness, and I indicated that I felt that the two run-off situations seem so entirely different. The primary run-off -- the primaries are conducted to nominate people. General elections are conducted to elect people. You would not have a run-off in the general election unless you had an independent party running. In other words, you would have a Democrat and a Republican. If you had those two, there couldn't be a run-off unless there was a tie, or if you had only the Democratic nominee of course there could be no run-

off, or if you had the Democrat and an independent there would be no run-off.

MS. KARLAN: Your Honor, the municipal elections are non-partisan. The municipal elections are covered by the general election run-off statute, so it wouldn't be the case ever that you would have a person running under the Democratic label or under the Republican label. Everyone runs as an independent.

THE COURT: And they don't file in the primaries at all.

MS. KARLAN: No, Your Honor.

THE COURT: They just file for the general election.

MS. KARLAN: Yes, Your Honor.

THE COURT: Which office are you talking about?

MS. KARLAN: Mayor of Helena, alderman; elections such as those. There's no party nomination system so there are often multiple candidates in the municipal general election because there's no prior device for screening.

THE COURT: I see. That that's not going to be a situation -- in other words, they are not going to go through the primary situation at all. It's just going to be whoever -- what do they have to do?

MR. NEAL: By petition, Your Honor.

THE COURT: A certain number of petitions?

MR. NEAL: Certain number of signatures on the petitions.

THE COURT: Well, then that particular type of run-off could occur and probably, I guess, maybe will occur frequently. I'm not sure. Let me ask you, though, on the more general proposition. Take the other offices, non-municipal offices. Has there ever been a run-off under the 1983 statute for a non-municipal office? Does anyone know?

MR. HUMPHRIES: For a county office, Your Honor? I'm not aware of one. We have looked at that a little bit and I'm just not aware of one.

THE COURT: I gather there's never been a run-off

situation in Phillips County at any rate for a non-city --

MR. HUMPHRIES: Not for county elections.

THE COURT: Has there ever been one for a city election?

MS. KARLAN: Yes, Your Honor.

THE COURT: In Phillips County?

MS. KARLAN: Yes, Your Honor, there were two in the 1986 general election.

THE COURT: Okay. Just for the record, those offices were what?

MS. KARLAN: Mayor and municipal judge.

THE COURT: Okay. Well, I have the problem of looking at these, as I believe, different issues and I have the further problem of necessary parties. What's your answer [sic] to that? You know, having the Democratic party and the Republican party before the Court is not a basis, it seems to me, to challenge general election run-off statutes. And I'm not sure that even if the other problems were out of the way

that we could go forward under the circumstances that we see here.

MS. KARLAN: Well, initially, Your Honor, although Mr. Humphries has made the argument that the role of the Secretary of State and the Governor in issuing the commissions is purely ministerial, if they are issuing commissions even in a ministerial capacity in a way that's not in accordance with federal law, then the supremacy clause would permit you to enjoin them. So I think this suit could have been brought without any service on the election commission at all because the Governor and the Secretary of State must act in a particular way in order for those people to take office.

THE COURT: Well, I'm inclined to disagree. You've got to serve the people, it seems to me, who are charged with the duty of conducting the election you are challenging or to effectuate the statute that you are challenging. The Governor as such and the Secretary of State

as such are not those people.

MS. BELL: We are talking about Bankston Waters and Judge John L. Anderson. In other words, Your Honor, it's my understanding that the chairman of the election commission was served.

THE COURT: That's because he is head of the Democratic party.

MS. GUINIER: He was served and one of the other members of the election commission was served, and then the Governor appoints the third person and the Governor was served.

THE COURT: Well, nobody is really taking the view, are you, that you have the Phillips County Board of Election Commissioners served in this case?

MS. GUINIER: Your Honor, we are taking that position.

MS. BELL: The People [sic] who are the Phillips County Election Commission have, in fact, been served.

THE COURT: If you sue the Democratic party and the Republican party and serve the chairman of those two parties, you have served two of the county board members -- members of the County Board of Election Commissioners, but you are not suing them as members of the County Board of Election Commissioners. You got service on them because of their roles as head of the party; the parties being the ones that conduct primary elections.

Well, I just think it's much too risky and there is no reason to do it. We ought to have the proper people before the Court to defend the general election statute, and so I'm going to stay with my ruling both on the grounds of essentially having no concrete case, lack of ripeness, but more particularly I think at this stage we just don't have the proper party before us and I don't think we can make do by the methods suggested, various people served in various capacities. But if you are going [sic] to sue the County Board of Election Commissioners, I think you should have taken the

trouble to serve that board as such, and all the service papers, as I see it, are in the file and you can look and see what you have done in that respect. But I don't see that you have.

I don't know that that's going to change anything in terms of what we are going to be facing on next week during the trial. I don't know that it will shorten it or not -- probably will not -- [sic] but I do think it will give us a clear focus upon what is to be determined and the evidence which is pertinent to that determination.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, et al.,	:	
	:	No. H-C-86-47
Plaintiffs,	:	Little Rock, Arkansas
	:	March 1, 1988
v.	:	3:00 P.M.
	:	
Bill Clinton, et al.,	:	
	:	
Defendants.	:	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE G. THOMAS EISELE,
United States District Court

APPEARANCES:

For the
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For the
Defendants: TIM HUMPHRIES, ESQ.
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PROCEEDINGS

THE COURT: All right, folks, can you hear me?

MR. HUMPHRIES: Yes, Your Honor.

THE COURT: Let me go through the list. Tim, you are there for the defendants.

Mr. Olly Neal?

MR. NEAL: Yes, sir.

THE COURT: And Ms. Pam Karlan?

MS. GUINIER: She's here.

THE COURT: And Lani Guinier?

MS. GUINIER: I'm here.

THE COURT: All right. There are quite a few things we need to deal with on this phone conference. We

have the court reporter. I'm going to go over the rulings that I think are appropriate and then discuss the various outstanding issues. It may be that another hearing or another conference might be necessary before the trial. If so, it might be conducted Friday. Perhaps it won't be necessary.

Let me take up first a problem which I just noticed as I reviewed the file yesterday. It's been mentioned to you by my law clerk, I think, and is a matter that has concerned me. The original complaint alleges that Sam Whitfield, Jr. ran as a candidate for the office of county judge of Phillips County in the Democratic primary of May 27, 1986. Linda Whitfield alleges that she was a candidate for the office of circuit clerk of Phillips County in the same Democratic primary. According to the complaint, Sam Whitfield received 34.6 percent of the vote leading a field of three candidates, the other two of whom were white. Mrs. Linda Whitfield alleges that she received 36.8 percent of the vote leading the field of four candidates which included three whites. Both

erroneously alleged that they were forced into a run-off by virtue of the provisions of Section 3-616 of the Arkansas Statutes. They claimed that this majority run-off requirement was established by the Arkansas Legislature in 1983. They alleged that the Act was passed with haste as a result of the outcry of the white majority over the election of a black mayor in a city in Arkansas. Their complaint stated that prior to the election of the black mayor, the "run-off statute was viewed as unnecessary by the white-dominated legislature of the State of Arkansas." They therefore challenged the 1983 Act codified as Section 3-616 of the Arkansas Statutes.

A motion to dismiss was filed challenging the standing of the plaintiffs on the ground that the run-off election was not held pursuant to Section 3-616. The defendants pointed out that Section 3-616 applied only to general elections concerning county or municipal offices and had nothing to do with run-offs in primary elections. The defendants did acknowledge that there is a run-off requirement for primary

elections. That requirement is found in Section 3-110, being Act 465 of 1969. They stated that the primary run-off statute of 1969 carried forward the run-off requirement established by earlier acts of the legislature, going back apparently to the early 1930's. And if I read the briefs right, I gather that those early enactments just simply kept in effect what was the run-off requirement that had been established prior to that time by Democratic party rules. The defendants therefore asserted that the plaintiffs have no standing to challenge Section 3-616 since neither suffered injury as a result of the application of that statute and therefore there was no justiciable case or controversy pursuant to Article III of the U.S. Constitution. The Court being without jurisdiction, they argued that the case should be dismissed.

On October 17, 1986, this Court entered an order essentially agreeing with the contentions of the defendants. The order states, [sic] inter alia:

"The record clearly establishes that the run-off election

in which plaintiffs were defeated was not mandated by Arkansas Statute Section 3-616 as plaintiffs allege, and that therefore plaintiffs have no standing to attack this particular statute as they have attempted to do in this proceeding."

Then further down in the order I quote:

"While the plaintiffs are correct in claiming that Section 3-616 does require a run-off election in certain circumstances, and that it was adopted by the General Assembly in 1983, this particular statute had nothing to do with the elections of which plaintiffs complain. Section 3-616 governs the general elections of Arkansas; it has no effect on the party primaries in which the plaintiffs participated."

And then further on in that same order we find the following quotation:

"Thus, plaintiffs' complaint is fundamentally flawed. Plaintiffs' complaint clearly rests on the existence of Section 3-616. But since plaintiffs have not suffered any harm by the workings of this statute in so much as they were defeated in

the party primary run-off, not the general election run-off prescribed in Section 3-616, plaintiffs have no standing to challenge this law."

The Court, while acknowledging the defect would warrant dismissal of the complaint, nevertheless decided to hold the matter in abeyance to permit plaintiffs to file a motion for leave to file an amended and substituted complaint. This ruling gave the plaintiffs an opportunity to move to amend and for the defendants to respond. The Court went on to say that it "will subsequently dispose with that motion along with the pending motion to dismiss."

On November 7, 1986, the plaintiffs were permitted to file and did file their Amended Complaint/Class Action. The amended complaint did challenge the primary run-off provisions of Section 3-110 but it also again attempted to challenge the general election run-off requirement of Section 3-616. Apparently the defendants did not again specifically renew their motion to dismiss with respect to Section 3-616

for lack of standing but they did assert that the amended complaint "fails to state a claim upon which relief can be granted." And the answer of the Phillips County Democratic Committee denied the jurisdiction of the Court, and denied that "plaintiffs have standing to challenge the acts and statutes challenged in said complaint." That answer also stated that "the amended complaint filed herein fails to state a claim upon which relief can be granted."

Now when I reviewed the file yesterday I noted this standing problem with respect to Section 3-616. I have read all of the pretrial submissions, including the trial briefs and the memorandum in support of and opposition to the pending motion for summary judgment and I find nothing in the plaintiffs' submissions to cause me to change the opinion which I expressed in my [suc] order of October 17, 1986, and that they have no standing to challenge Section 3-616.

Now the failure of the defendants and the Court to pick up on the standing challenge with respect to Section 3-

616 has led to an inappropriate class certification with respect to certain of the defendants. Since the plaintiffs have no standing to challenge the general election run-off statute, Section 3-616, they would also be inappropriate representatives of a class of persons wishing to challenge that statute. Of course, the plaintiffs were not certified as representatives of such a class. However, the problem arises with respect to the certification of the Phillips County Board of Election Commissioners as representative of a class of all county boards of election commissioners in the state.

The Court first notes that the Phillips County Board of Election Commissioners was not made a party in the original complaint. It was first named as a party in the amended complaint filed November 7, 1986. Paragraph 14 of the amended complaint states that the Phillips County Board of Election Commissioners "is responsible for overseeing the conduct of elections within Phillips County, Arkansas." However, the law appears [sic] to be clear that the primary

elections are not conducted by the county boards of election commissioners but, rather, by the political parties. See Ark. Stats. as more recently codified 7-7-101, et. seq. Since the Court is ruling that the plaintiff has no standing to challenge the general election run-off statute, neither the Phillips County Board of Election Commissioners individually or as a representative of other county boards of election commissioners, is an appropriate party defendant. Furthermore, the file does not reflect that the Phillips County Board of Election Commissioners was ever served, nor has it ever entered its appearance or filed any response voluntarily, so far as I could determine from a quick review of the file. Therefore, the Phillips County Board of Election Commissioners will be dismissed from this case and the class of county boards of election commissioners of which the Phillips County Board was the representative, will be de-certified.

The Court is also persuaded that the motion for

summary judgment filed by the defendants Governor Bill Clinton and Secretary of State McCuen should be granted on the ground that they are not necessary parties and that no claim of wrongdoing has appropriately been asserted against those defendants. Neither the State Board of Election Commissioners nor any of its members are named as defendants in the amended and substituted complaint. Apparently they were named in the original complaint, at least certain of the constitutional officers, some of which are members of that board of election commissioners. As pointed out by the separate defendants, if the Court were to require that the defendant political county committees certify certain candidate,s "then separate defendants Clinton and McCuen cannot exercise their legal functions in any way other than to issue commissions and certify those candidates certified to them, since, they only commission and certify candidates and results certified by local authorities." There is no basis in the alleged facts or otherwise to suggest they would not folow

their duty in conformance with the statements which they made in their motion.

Since no cause of action upon which relief could be granted in favor of plaintiffs has been propery asserted against defendants Bill Clinton and W. J. McCuen, those defendants will be dismissed from the lawsuit.

Now when the Court was dealing with the class certification issue with respect to the county committees of political parties in the State of Arkansas, it ordered that "the defendant Phillips County Democratic Committee and the Phillips County Republican Committee be and they are hereby appointed as the named representatives on behalf of the following defendants' class: all political parties' county committees in the State of Arkansas." In order to carry out this order it directed that the Phillips County Republican Committee be served and made a party for the purpose of establishing an appropriate defendant class. See order of April 13, 1987. The file reflects that the summons and

complaint was served upon the Phillips County Republican party Committee in care of Mr. Bankston Waters on May 9, 1987.

Neither the Republican party nor the Phillips County Republican Committee are named in the amended complaint. Obviously they had nothing to do with the conduct of the Democratic primary of which the plaintiffs, Sam Whitfield, Jr. and Linda Whitfield, complain. However, the Phillips County Republican Committee, just like the Phillips County Democratic Committee, is charged with the duty of conducting preferential primary and general primary elections under Arkansas law. If it should turn out that prospective and injunctive relief is found to be appropriate in connection with the primary run-off law, then both political parties would be or could be affected thereby.

The Court is further concerned about the breadth of the defendants' class certification of the Phillips County Democratic and Republican Committees as representatives of

all such committees in the State of Arkansas. It is having some second thoughts about the breadth of that order. However, it will not disturb that certification at this time.

The Court has some doubt whether a cause of action has appropriately been asserted against the Democratic party of the State of Arkansas or the Democratic Central Committee. However, no motion to dismiss has been filed with respect to those parties [sic] and it is possible that it could be useful to have them as parties if prospective injunctive relief were found to be appropriate. Therefore, it looks as the case goes to trial as if the defendants are the Democratic Part of the State of Arkansas, the Democratic State Committee and the Phillips County Democratic and Republican Committees and this emphasizes what we are about here, which is a challenge of the run-off provisions dealing with primary elections. And I am convinced that this is the full scope of the standing of the plaintiffs and the focus that should be -- which we should have during the trial.

I want to get some factual information if I can. Going back to the election in which the Whitfields ran -- that was May 27 of 1986. Is there anyone there who can tell me whether there was a Republican candidate in the 1986 general election following those primary elections? That is, in the general election in November, was there a Republican and a Democrat? And I also want to know whether anybody knows whether, in that election, there was an independent candidate. Can anybody speak to that?

MR. NEAL: I can speak to it. There was neither an independent candidate nor a Republican candidate for the office of county judge in the November election.

THE COURT: As I understand it, Mr. Neal, the law had been changed prior to that election so that the filing time for independent candidates, the deadlines, were the same as with those who wanted to run in the party primaries.

MR. NEAL: That is correct.

THE COURT: So the effect of this would have been

that had the Whitfields -- had there been no run-off in the primary, they would have been elected without opposition in November because there was no Republican running against them and there was no independent party running against them.

MR. NEAL: That's my information.

THE COURT: That, I think, emphasizes again the lack of standing with respect to the general election run-off which is contemplated by Section 3-616. So let me find out a few more things as we get further into the discussions.

MS. KARLAN: Your Honor, is it possible for us to respond at some point during this conference call to your orders?

THE COURT: Yes, you may. Perhaps what I should do is just stop now and give you a chance to comment and make your statements. Now, would you state your name, each person who talks, for the purposes of the record. Go ahead and state. Try to change my mind. Who wants to

speak?

MS. KARLAN: Pamela Karlan. I'm one of the attorneys for the plaintiff.

THE COURT: Go right ahead.

MS. KARLAN: With regard to Your Honor's ruling on standing, the standing of the plaintiffs here is not being brought in their capacity as candidates for election at any particular election; rather their standing rests on the fact that they are registered voters in Phillips County and in the State of Arkansas. The practices that they are challenging -- this is not a challenge to the particular result of any election. We are not seeking to have the 1986 election overturned or any other particular election results. Rather, this case represents a structural challenge to particular structural features of the election law in Arkansas; and the fact that no particular black candidates have lost any election as a result of the general run-off law is not in itself a barrier to standing.

With regard to that, I simply refer Your Honor to

page 28 of the Senate Report, Senate Report 97-417 in 1982 which the Supreme Court has interpreted as an authoritative guideline for interpreting Section 2 cases. In the middle of that page the Senate Report states that Section 2 protects the right of minority voters to be free from election practices, procedures, or methods that deny them the same opportunity to participate in the political process as other citizens enjoy. The standing of the plaintiffs here, therefore, rests on their status as voters; not in their status as candidates.

In that regard I think there need not have been a black candidate already who has lost an election because of a particular practice for there to be standing. The Supreme Court held that in Thornburg against Gingles -- the citation which is 92 Lawyer [sic] Edition 25, 1986. In addition, several lower courts have since then found standing for plaintiffs and in some cases found liability despite the fact that no black candidates have run.

With regard to that, Your Honor, I refer you first to

Martin against Allain, 658 F.Supp. 1183, a case from the Southern District of Mississippi in 1987 and Chisom against Edwards, a case decided yesterday by the Fifth Circuit challenging the use of multi-member districts for the Louisiana Supreme Court, even though no black candidate had run, and challenging the standing of plaintiffs in that case to challenge the electoral mechanism. The Supreme Court found they had stated a claim and were entitled to provide the evidence at trial to show that results had been violated.

THE COURT: Well, you know, I'm going to look at those two cases. The last one is the Chisom case, and it was decided yesterday?

MS. [sic] KARLAN: Yes, Your Honor.

THE COURT: And it's the Fifth Circuit?

MS. KARLAN: Yes.

THE COURT: We can get it on the facsimile machine.

But my view of standing makes really the Senate

statement perhaps irrelevant. There's been no [sic] showing that the run-off provision of general elections has harmed the blacks or any other plaintiffs, and all you could be showing, I think, is that it could possibly harm them. You would deprive the Court of any particularized investigation of the consequence of the statute in terms of the actual circumstances pertaining in the county in connection with general elections. We would be dealing with an abstract, theoretical question. We would not be dealing with a concrete circumstance.

Now, I'm going to review those to see if they cause me to change my mind. But I don't believe they do. I think the opinion I first expressed is correct back when the original motion to dismiss was filed. I also think it really runs contrary to the theory of Section 2 of the Voting Rights Act that you would deal with these issues abstractly on the basis of potentials without any actual showing of harm. I say this particularly because reading all these cases has led me to

believe that the particular local circumstances can have a dramatic -- can dramatically change the results in terms of whether run-off is good or bad for minorities. It cannot be dealt with, as I see it, in sort of an abstract question. At least that's my view. I might change my mind after reading the cases, and I certainly will.

Do you have anything [sic] else to say in connection with the standing problem?

MS. KARLAN: Yes, Your Honor. In addition to the plaintiffs' results claim under Section 2 with regard to now what's Section 7-5-106, we are also challenging the general election run-off statute on the grounds that it was adopted with a discriminatory intent in that it was designed and was motivated in part by a desire to dilute black voting strength.

Now with respect to that claim, there is some division as to precisely the level the plaintiffs must show, but it's clear it need not rise to the level of effect that need be shown under the results test. With respect to that, Your Honor, I think

that the plaintiff has standing to challenge a law that was adopted with a discriminatory intent before they go through the futile effort of running candidates in a race which the candidates are, by the structural nature of the provision, doomed to lose.

THE COURT: Well, I think your second statement is the more correct one. I don't believe that you are correct when you assert that as maybe one or two cases of that proving discriminatory intent in the enactment is all you have to prove. I think it's -- certainly if you have some discriminatory effect, then, you know, you don't need to prove nearly as much discriminatory intent. I agree on that proposition, but I don't believe you can simply attack a statute as soon as its passed by the legislature on that ground without having some basis for showing its application in some concrete contention in which a person is harmed by the statute.

So, in other words, the concepts of standing, I think,

are what we are really in disagreement about. It requires a concrete case in controversy and not just an abstract question that something -- that a run-off provision could possibly harm you.

MS. KARLAN: I understand, you know, that Article III prohibits advisory opinions, but I think the footnote in Gingles regarding how you would go about, for example, showing racial polarization if the minority [sic] has not sponsored any candidates since a particular practice was instituted shows that the Supreme Court at least does not view the fact that there is not a particular election result being challenged to preclude its access to lawsuit.

THE COURT: I guess what you could do here -- I don't know how many other run-off statutes there are in Arkansas, but I guess there are probably several. I'm not sure. Are there? Are there other run-off statutes that you are familiar with in Arkansas?

MS. KARLAN: No, Your Honor. I believe that the

two statutes are the primary election statutes, which was 3-110(a) at the time the lawsuit was filed and the municipal and county office statute, which was 3-616 at the time the lawsuit was filed. I'm not aware of any other run-off statutes.

THE COURT: Well, you know, I'm going to stand by my ruling until I convince myself that I'm wrong. I'm going to read the cases and review the points that you have made and we'll shortly get back with you. If I change my mind, I will be telling you tomorrow, getting word to you through my law clerk at least.

MS. KARLAN: Your Honor, just one more thing on this aspect of the case. If Your Honor decides that there is no standing with regard to the general election run-off statute, I think for purposes of this case it would make a great deal of sense, both to get a written opinion and perhaps to have a final appealable order entered on it so the case isn't tried piece-meal, assuming that eventually we are able to show that we have standing to challenge both the general election and

the primary run-off statutes.

THE COURT: Well, this order and my discussion of it is on the record and an order itself will be entered if I stay with this position dismissing the attack or the challenge to the general run-off provision and so the record will be complete.

As far as if the idea is that you want to appeal that before you try the case, you know, it's so different a situation -- that is, the general election from the primary, as I see it -- that there is no reason not to go ahead and try the attack on the primary law even if you reverse me on the other, in other words, and have to come back and try the general. They are just two separate and different animals, as I see it, and I don't know of any harm that would come from trying them separate. But in any even, we are going to be entering an order pursuant to this after I convince myself I'm right, if you don't change my mind, and there it will be. You can either move for a continuance or move to appeal and go through all that if you want to; but my general inclination is

to proceed with the trial of the real conflict presented by the Whitfields when they filed the complaint, which is an attack on the primary run-off, which is entirely different, as I analyze it, from run-offs in general elections which also may be challenged to have different factors at work and are really different at, as I see it.

In any event, you will have a formal ruling and I might supplement it with some analysis of the cases, but at this you have what I have said on the record and that's all you really need if I don't say anymore. There will be an order entered probably tomorrow making the ruling explicit.

STATUTES IN ISSUE

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Ark. Stat. Ann. § 7-5-106 provides, in pertinent part:

> (a) Whenever there are more than two (2) candidates for election to any county elected office, including the office of justice of the peace, or for any municipal office at any general election held in this state, and no candidate for the municipal or county office receives a majority of the votes cast for the office, there shall be a runoff general election held in that county or municipality two (2) weeks following the date of the general election at which the names of the two (2) candidates receiving the highest number of votes, but not a majority, shall be placed on the ballot to be voted upon by the qualified electors of the county or the municipality, as the case may be. The person receiving the majority of the votes cats for the office at the runoff general election shall be declared elected.

Ark. Stat. Ann. § 7-7-102:

> (a) Nominees of any political party for United States Senate, United States House of Representatives, state, district, or county office to be voted upon at a general elected shall be certified as having received a majority of the votes cast for the office, or as an unopposed candidate, at a primary election held by the political party in the manner provided by law.
>
> (b) Nominees of any political party for township or municipal office shall be declared

by certification of a primary election as provided in subsection (a) of this section.

Ark. Stat. Ann. § 7-7-202 provides, in pertinent part:

> (a) Whenever any political party shall, by primary election, select party nominees as candidates at any general election for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election . . . .
>
> (b) A general primary election shall not be held if there are no races where three (3) or more candidates qualify for the same office or position as provided in subsection (c) of this section, unless a general primary election is necessary to break a tie votre for the same office or position at the preferential primary.
>
> (c) If there are no races where three (3) or more candidates qualify for the same office or position, only the preferential primary election shall be held.

(3)

No. 90-383

FILED

OCT 3

JOSEPH F. SPANIOL, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P. L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, AND SAM BENNETT ..... *Petitioners*

vs.

BILL CLINTON, GOVERNOR OF ARKANSAS; W. J. MCCUEN, SECRETARY OF STATE OF ARKANSAS; THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS; THE DEMOCRATIC PARTY OF ARKANSAS; THE DEMOCRATIC STATE COMMITTEE; AND THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE .... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTIONS PRESENTED

I.

WAS THE RUNOFF PRIMARY IN PHILLIPS COUNTY, ARKANSAS, IMPOSED OR APPLIED IN A MANNER WHICH RESULTED IN A DENIAL OR ABRIDGMENT OF THE RIGHT OF ANY CITIZEN TO VOTE ON ACCOUNT OF RACE OR COLOR IN THAT BLACK CITIZENS HAD LESS OPPORTUNITY THAN OTHER MEMBERS OF THE ELECTORATE TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE IN VIOLATION OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973?

II.

IS IT NECESSARY OR APPROPRIATE FOR THIS COURT TO CONSIDER WHETHER THE COURT BELOW ERRED IN ESTABLISHING A THRESHHOLD REQUIREMENT FOR MAINTENANCE OF A VOTING RIGHTS ACT CHALLENGE TO A PRIMARY RUNOFF ELECTION WHEN THE THRESHHOLD REQUIREMENT WAS MERELY AN ALTERNATE GROUND FOR DISMISSAL OF THE COMPLAINT?

III.

ARE STATE EXECUTIVE BRANCH OFFICIALS NECESSARY PARTIES IN A CHALLENGE TO RUNOFF PRIMARY ELECTIONS IN A SINGLE COUNTY WHERE THOSE STATE OFFICIALS MERELY PERFORM THE MINISTERIAL DUTY OF CERTIFYING THE ELECTIONS AND COUNTY PARTY OFFICIALS ACTUALLY IMPLEMENT THE LAWS IN QUESTION AND CARRY OUT THE ELECTION?

LIST OF PARTIES

The names of all the parties to the proceedings below appear in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION OF THIS COURT 2

STATEMENT OF THE CASE 3
- Introduction 3
- Statement of Facts 4

REASONS WHY THE PETITION SHOULD BE DENIED 8
1. There is no conflict of decisions 9
2. The decision below is limited to the facts of this case and will have little effect beyond the instant case 14
3. The court lacks jurisdiction on the third issue presented by the petition 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Butts v. City of New York, 779 F.2d 141 (2nd Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) 28 U.S.C. §1254(1) 9

Cameron v. Hodges, 127 U.S. 322 (1888) 17

City of Port Arthur v. United States, 459 U.S. 159 (1982) 10

City of Richmond v. United States, 422 U.S. 358 (1975) 11

City of Rome v. United States, 446 U.S. 156 (1980) 10

Parker v. Ormsby, 141 U.S. 81 (1891) 17

Rogers v. Lodge, 458 U.S. 613 (1982) 13

Thornburg v. Gingles, 478 U.S. 25 (1986) 12

White v. Regester, 412 U.S. 755 (1973) 13

STATUTES:

A.C.A. §7-7-202 4

A.C.A. §7-5-310 6

A.C.A. §7-5-402 6

OTHER:

Wright & Miller, Federal Practice & Procedure, Vol. 16, Section 3949, Page 356 (1977) A.C.A. §7-5-106 16

No. 90-383

IN THE
SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Bill Clinton, Governor of Arkansas; W. J. McCuen, Secretary of State of Arkansas; the Phillips County Board of Election Commissioners; the Democratic Party of Arkansas; the Democratic State Committee; and the Phillips County Democratic Committee, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Eighth Circuit's decision in this case

affirming the United States District Court for the Eastern District of Arkansas. The *en banc* opinion is reported at 902 F.2d 15. The opinion of the Eighth Circuit panel is reported at 890 F.2d 1423. The district court's opinion is reported at 686 F.2d 1365.

JURISDICTION OF THIS COURT

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit upon rehearing *en banc*, summarily affirming the decision of the United States District Court for the Eastern District of Arkansas, was issued on May 4, 1990.

On July 26, 1990, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari to and including August 31, 1990.

This Court has jurisdiction under 28 U.S.C. §1254(1) on issues one and two in the petition. The Supreme Court lacks jurisdiction on the third issue, which involves whether the state defendants were correctly dismissed, because that issue was not timely appealed from the district court.

STATEMENT OF THE CASE

INTRODUCTION

The petitioners (plaintiffs below) are black citizens of Phillips County, Arkansas. Two of the petitioners (the Whitfields) were candidates for countywide executive branch offices in the 1986 and 1988 Democratic primary elections. The respondents are the Governor and the Secretary of State of the State of Arkansas, the State and Phillips County Democratic Parties, and the Phillips County Board of Election Commissioners.

Petitioners challenged the legality of Arkansas' majority vote requirement in party primary elections and in municipal and county general elections. The complaint contained two principal claims. First, petitioners asserted that the runoff laws, as applied in Phillips County, violated Section 2 of the Voting Rights Act. Second, they asserted that the majority vote laws were enacted and had been maintained by the Arkansas Legislature with a racially discriminatory purpose in violation of the 14th and 15th Amendments of the United States Constitution.

Prior to trial, the district court dismissed the complaint with regard to the general election runoff statute because the plaintiffs failed to serve the complaint on the members of the Phillips County Election Commission, who were, the court held, indispensible parties. Additionally, the court grounded its dismissal of the general election runoff claim on the fact that no black candidate had in fact lost a general election in a runoff.

Also prior to trial, the court granted summary judgments in favor of the Governor and the Secretary of State because

they were not necessary parties and no claim of wrongdoing had been asserted against those defendants.

After a four-day trial, the court dismissed all remaining claims.

A panel of the Eighth Circuit Court of Appeals affirmed the district court's judgment as to the constitutional claim, holding that the majority vote requirement was not enacted or maintained with a discriminatory purpose. That holding is not at issue here. The panel reversed the district court's judgment on the Section 2 claim. On reconsideration *en banc*, an evenly divided Eighth Circuit affirmed the district court's judgment on both claims.

Statement of Facts

The statutes which are the subject of this petition are A.C.A. §7-7-202 which provides for a runoff primary election if no candidate wins a majority in the first party primary, and A.C.A. §7-5-106 which provides for a runoff when candidates for municipal or county office fail to receive a majority of the votes cast in a general election. These statutes apply to all such elections statewide.

According to the 1980 Census, the population of Arkansas was approximately 16.3 percent black. About 47 of the 75 counties in Arkansas had black populations below the statewide percentage, and 21 counties were less than 1 percent black. Twenty-two counties had a black population over 25 percent. The total population of Phillips County was 35,772, approximately 53 percent black, and approximately 47 percent of the voting-age population was black.

Two of the petitioners, Sam and Linda Whitfield ran in

the 1986 and 1988 Democratic primaries, Mr. Whitfield for the office of County Judge and Ms. Whitfield for the office of Circuit Clerk. The County Judge is the chief executive officer in county government, and the Circuit Clerk is the clerk of the county's circuit court, which has criminal and civil jurisdiction. Both are single-member, executive offices. Each of the Whitfields faced two white candidates in each of these elections. In each of their first primaries, the Whitfields finished first, with percentages in the mid-30s. Each of the Whitfields lost their subsequent runoff elections.

As the district court found, there have been no legal barriers in Arkansas to black citizens' participation in the political process since at least 1965 when the poll tax was repealed by popular vote in a statewide referendum. Particularly with regard to Phillips County, the County Clerk, who is the chief deputy registrar, has made a great effort to register blacks, having appointed approximately 40 volunteer deputy registrars by the time at trial, approximately 80 percent of whom were black. Those deputies registered mostly black voters. Volunteer deputy registrars are empowered to register voters anywhere in the county at any time without restriction.

The district court found that black voters in Phillips County do not face harassment or intimidation in registering, or voting, or in running for office. Some polling places have been moved in predominantly black precincts as they have in predominantly white precincts, because the polling places are not permanent. The location of polling places or their movement does not constitute a significant barrier to black or white participation in Phillips County, though, the district court found. Black leadership in Phillips County is highly organized and motivated during elections and provides

transportation for black voters who request such assistance. The district court found that the laws relating to the assistance of persons at the polling booths have been liberalized so that a voter who cannot read or is otherwise disabled may be assisted by a person the voter selects. A.C.A. §7-5-310. Any voter who cannot attend the polls on election day may vote absentee. A.C.A. §7-5-402. (See, generally, 87a-89a).

The party primary runoff, which was the subject of the trial in this case, resulted from a popularly enacted amendment to the State Constitution in 1938. The issue of runoffs first came into focus in the mid-1920s when the proponents of the majority vote requirement argued for its use as a method to thwart the rise of the Ku Klux Klan as a political force in Arkansas. Then, in 1928, Harvey Parnell won the Democratic gubernatorial primary over Brooks Hayes and a field of five other candidates with a 42 percent plurality. In 1933, the legislature passed a runoff bill, which it repealed in 1935. Then, in 1936, Carl E. Bailey polled just 35 percent of the vote in a five-candidate primary field to win the governorship. To insulate the runoff requirement from further legislative tampering, the *people* in 1938 enacted Amendment 29 to the Arkansas Constitution, which provided for runoffs. Throughout this period, blacks could not legally vote in the Democratic Primary. Also throughout this period (and in Phillips County now) the nomination in the Democratic Primary was tantamount to election since there was no Republican opposition.

Both of the state statutes in question here apply statewide. County judges, sheriffs, county clerks, county treasurers, circuit clerks, justices of the peace (7 to 13 in each county, forming the county's legislative branch, the quorum court), circuit and chancery judges, representatives, senators,

aldermen, mayors, and other officials are all nominated in partisan primaries or elected in non-partisan municipal elections subject to the runoff requirement throughout the state. In effect, thousands of offices every two years are subject to the majority vote requirement, and most of these races occur in jurisdictions where blacks form an insignificant portion of the population, since the vast majority of these jurisdictions are virtually all white. The state does not require a runoff after the general elections for some offices, primarily statewide offices. However, plaintiffs were unable to point out a single election in which a third party candidate in such an election was able to capture enough votes in the general election so that the winner received less than a majority because, indeed, this has never happened.

REASONS WHY THE PETITION SHOULD BE DENIED

The Voting Rights Act serves the laudable purpose of protecting citizens from governmental actions and structures which impede their ability to "participate in the political process and to elect representatives of their choice" on an equal basis. It is a remedial statute, the goal of which is to identify the standards, practices and procedures for voting which, inter alia, result in discrimination against minority groups.

Petitioners here propose a cynical perversion of that fundamental purpose. They want this court to allow losing political candidates to reverse the results of non-discriminatory elections by making post hoc changes in fundamental and traditional election rules. The result petitioners seek in this case is to have two sets of rules for elections in Arkansas. One set of rules would allow runoffs in elections involving three white candidates, or three black candidates, or two black candidates and one white candidate in a majority black subdistrict, or three-candidate races in which a black candidate finishes second and is enabled, by virtue of the runoff, to have a second chance to win. Petitioners want another set of rules for elections in which two white candidates and one black candidate run, and the black candidate gains a plurality. The Voting Rights Act does not countenance such a perversion of the election process. The Voting Rights Act properly applies to cases involving the dilution of a minority's voting strength through discriminatory districting schemes and to cases challenging alleged structural impediments to registration or voting or other forms of participation in the electoral process. This is obviously not such a case. This case involves only those four races in which two of the plaintiffs ran and finished first in three-candidate primaries with plurality percentages in the

mid-30s. The district court correctly found that in those four races the Voting Rights Act was not implicated and the Eighth Circuit correctly affirmed. For these reasons, and those stated below, review by this Court is neither necessary nor appropriate.

I.

THERE IS NO CONFLICT OF DECISIONS.

The first issue presented in this petition is whether the runoff primary in Phillips County, Arkansas was imposed or applied in a manner which resulted in a denial or abridgment of the right of any citizen to vote on account of race or color in that blacks had less opportunity than whites to participate in the political process and to elect representatives of their choice. The only other circuit to have considered this issue reached the same conclusion as the Eighth Circuit. In *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), the court reviewed a New York law under which candidates for certain offices must receive 40 percent or more of the votes cast in a party primary election to avoid a runoff. As in the instant case, the challenged runoff requirement in Butts involved executive offices held by one person. In analyzing the situation before it, the Second Circuit noted:

> There are two basic ways in which members of a class of citizens may have "less opportunity . . . to participate in the electoral process." There may either be restrictive practices that deter members of the class for voting, or electoral arrangements that diminish a class's opportunity to elect representatives in proportion to its numbers. Although the Act makes clear that a class

> has no right to elect its members by numerical proportion, the class does have the right to an opportunity, equal to that of other classes, to obtain such representation.

Id. at 148.

The court noted various methods of denying such opportunity, such as creating electoral districts with small minority populations, class-based gerrymandering, splitting minority areas into two or more electoral districts, and at-large elections. The court also recognized that "a runoff requirement can exacerbate the unfair effect of at-large elections for a multi-member body, and has been invalidated in that context." *Id.*, citing *City of Rome v. United States*, 446 U.S. 156 (1980). The court went on to hold that:

> We cannot . . . take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of election for single member offices. There can be no equal opportunity for representation within an office filled by one person. Whereas in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single member office. The distinction is implicit in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), where the court struck down a runoff requirement that Port Arthur had appended to its at-large voting system for seats on the multi-member city council, but made no mention of a similar runoff requirement for the election of mayor. The latter runoff was not even challenged.

Id. at 148-149.

The Second Circuit went on to note that ". . . so long as the winner of an election for a single member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class equal opportunity for representation." *Id.* at 149. The reasoning of the Second Circuit was, then, that the Voting Rights Act recognized implicitly certain fundamental electoral precepts which were ingrained in our democracy. One of those, as the court recognized, is

> The rule in elections for single member offices . . . that the candidate with the most votes wins, and nothing in the Act alters this basic political principle. Nor does the Act prevent any governmental unit from deciding that the winner must have not merely a plurality of the votes, but an absolute majority . . . or at least a substantial plurality, such as a 40 percent level required by [New York law].

Id. Even the dissenting judge in *Butts* agreed with this rationale with regard to open primaries, such as are practiced in Arkansas. *Id.* at 155. The runoff law in New York did not trigger Section 2 analysis because it:

> Merely provides that the nominees for three city offices traditionally elected by majority or large plurality actually represent the views of a majority or a large plurality of their parties' voters. It is possible that the runoff law may make it harder for the preferred candidate of a racial minority — or ideological minority — to win a party's nomination, but, as we have noted, the Act is concerned with a dilution of minority participation and not the difficulty of minority victory. [citing *City of Richmond v. United States*, 422 U.S. 358 (1975).]

Id.

The district court here found that the runoff requirement, itself, did not dilute minority participation. Just as the *Butts* court made its decision based on a functional analysis of the runoff requirement, so did the district court here. The function of the runoff requirement, the district court held, is simply to see that officials who are traditionally elected by the majority of votes in most jurisdictions are elected by the majority of votes in a one-party jurisdiction such as Phillips County. That is the function of the runoff requirement that is a result of the runoff requirement. The traditional and universally accepted notion that the winning candidate should be the one who can procure the votes of the majority of those who care to get out and vote is not subject to attack under the circumstances in both cases. Just as petitioners would not be able to have the most vote requirement changed, they cannot have a majority vote requirement eliminated. As the district court stated, "we are dealing here with the very heart of our political system." (127a)

This case, like *Butts*, was correctly decided. There is no split in the circuits. Review by this court is neither necessary nor appropriate.

The second issue raised in the petition is whether the district court could establish a threshhold test for Section 2 cases involving runoff elections that such suits could not be brought if the black voting age population of the contested area is practically equal to the white voting age population. Petitioners assert this ruling conflicts with decisions of this court, as well as of other circuits. This argument totally lacks merit. Indeed, the opinion of this court which petitioners cite as having rejected such tests actually *established* a three-part threshhold test for maintaining Voting Rights Act suits in multi-member district cases. *See Thornburg v. Gingles*, 478

U.S. 25 (1986). The other Supreme Court cases cited by petitioners, *White v. Regester*, 412 U.S. 755 (1973), and *Rogers v. Lodge*, 458 U.S. 613 (1982), did not deal with majority vote requirements, but, instead, concerned at-large election issues. The same is true for the Fifth and Eleventh Circuit cases cited by petitioners.

In *Gingles*, this Court noted that Voting Rights Act challenges to different types of election practices will require the application of different tests. Referring to the Senate Report factors used by the courts in assessing at-large election cases, the court stated:

> While the enumerated factors will often be pertinent to *certain types* of Section 2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered.

Id. at 45. Just as the *Gingles* threshhold requirements for maintaining a multi-member district case is particularly tailored to its subject matter, so will the tests to be employed to measure Voting Rights Act violations in other contexts be specifically tailored to their subject matter.

Finally, the third issue raised in the petition asks whether the Governor and Secretary of State are necessary parties to bring a challenge of a runoff requirement when those individuals perform merely ministerial functions. Petitioners cite numerous cases where such governmental officials were parties, but do not cite any authority, because there isn't any, to the effect that such governmental officials are necessary parties. Even if this court had jurisdiction over this claim, it should not grant the petition because plaintiffs could have maintained the action simply by serving notice on those local election officials who actually ran the elections in question and

were closest to the facts of the action. Just because other cases, in which this issue was never raised, have been maintained with state officials as parties does not mean that the district court's refusal to allow such an action conflicts with any decisions of this court or another.

II.

THE DECISION BELOW IS LIMITED TO THE FACTS OF THIS CASE AND WILL HAVE LITTLE EFFECT BEYOND THE INSTANT CASE.

The laudable purposes of the Voting Rights Act have been well served in the area of eliminating discriminatory at-large elections and multi-member districting schemes. Scores, perhaps hundreds, of cases have resulted in the creation of single member districting schemes for legislative bodies at every level of government. Because of the existence of the Voting Rights Act, it is safe to say that hundreds, perhaps thousands, of black elected government officials run for office in majority black districts. It should be pointed out that this result has been achieved not just through litigation, but through structural changes which have occurred in the political process as well.

Petitioners are presumably not challenging the existence of runoffs in predominantly black districts or subdistricts where black preferred candidates would be hurt rather than helped by the elimination of the runoff. Presumably, petitioners do not challenge the runoff requirement in any race where a black candidate would not be potentially harmed by the runoff — that is, races in which a black candidate runs against two white candidates and receives a plurality of the vote. By dropping their constitutional and statewide claims,

petitioners clearly are seeking relief only in the narrowly limited set of circumstances in which black candidates would be helped by the elimination of the runoff.

Given those circumstances, the effects of a ruling favorable to petitioners would be extremely limited. Indeed, a ruling in their favor probably wouldn't even help petitioners because there is no guarantee that the white community would not coalesce around one white candidate, or that the white community would not gravitate to the Republican Party to create general election challenges to defeat minority candidates in the absence of the runoff requirement. Indeed, even if it could be held that the runoff requirement violated the Voting Rights Act in this case, there could be no remedy consistent with the democratic election process which would even come close to assuring blacks success at the polls. The existence of an adequate remedy is a prerequisite to finding a violation of the Voting Rights Act. *See Gingles, supra.* In *Gingles,* the test for a violation was determined by reference to an established norm — single member districts. Here, the established norm *is* the runoff requirement. Any test for a violation that the court would establish in this case, then, would be strictly limited to the factual circumstances that exist in this case and would affect few, if any, others than the litigants herein.

It should be noted that petitioners apparently agree that this case is fact-bound and limited to a narrow issue. In their response to respondents' "Petition for Rehearing and Rehearing En Banc" in the Eighth Circuit, petitioners argued that the issue in this case is not "a question of exceptional importance." Petitioners further asserted that challenges to runoff elections must be analyzed "in light of the distinctive facts and unique political conditions they present." That being

the case, it cannot be successfully argued here that the issue merits review by this court.

III.

THE COURT LACKS JURISDICTION ON THE THIRD ISSUE PRESENTED BY THE PETITION.

The third issue presented by the petition is whether the district court correctly granted summary judgment in favor of the Governor and Secretary of State on the grounds that they weren't necessary parties when the county officials who actually implement the laws in question and carry out the elections in question were not served with the complaint.

This issue was never the subject of an appeal to the Eighth Circuit Court of Appeals and it is not, therefore, appropriate for this Court to review it. In their notice of appeal from the district court to the Eighth Circuit, petitioners gave notice that they appealed only "from the final judgment of the district court entered in this action on the 20th of May, 1988." The judgment rendered May 20, 1988 is specifically limited to the issues which were tried and the findings of fact, conclusions of law set forth in the district court's memorandum opinion. (58a-132a) The district court granted the summary judgment in favor of the Governor and the Secretary of State in an Order dated March 4, 1988. (132a-133a) Clearly, petitioners were not appealing the order of March 4, 1988 in which the court granted the summary judgment. The appellate court may not infer that the notice of appeal included the March 4th Order since it did not specifically so state. See, generally, *Wright & Miller, Federal Practice & Procedure,* Vol. 16, Section 3949, Page 356 (1977). It is equally clear that the Eighth Circuit did not consider this

issue to be before it since neither the panel, nor the court *en banc* commented on the issue. Since the Court of Appeals is precluded from reaching this issue, this Court would likewise be prevented from resolving the merits upon grant of certiorari. In order for this Court to exercise jurisdiction under 28 U.S.C. §1254, a case must be "in" the Court of Appeals. Since the Court of Appeals did not have jurisdiction on this question, the case is not properly "in" the Court of Appeals and the issue cannot thus be decided here. *Cameron v. Hodges*, 127 U.S. 322 (1888); *Parker v. Ormsby*, 141 U.S. 81 (1891).

CONCLUSION

For the reasons stated above, and for the reasons stated by the district court in its opinion, this Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SAM WHITFIELD, JR., ET AL., PETITIONERS

v.

BILL CLINTON, GOVERNOR OF ARKANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether black voters have standing to challenge a state law majority vote requirement under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, when they comprise 47% of the voting age population of the jurisdiction.

2. Whether the district court erred in concluding after trial, under the totality of the circumstances, that a state law requirement that a party nominee win "a majority of all the votes cast for candidates for the office in a primary election" did not deprive black voters of rights guaranteed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Butts v. *City of New York*, 779 F.2d 141 (2d Cir. 1985)	9, 17
City of Port Arthur v. *United States*, 459 U.S. 159 (1982)	13
City of Rome v. *United States:*	
446 U.S. 156 (1980)	10, 11, 13, 14
472 F. Supp. 221 (D.D.C. 1979)	14
McCray v. *New York*, 461 U.S. 961 (1983)	10
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	3, 11, 14, 15, 16, 17, 18, 19
Westwego Citizens for Better Gov't v. *Westwego*, 872 F.2d 1201 (5th Cir. 1989)	19
White v. *Regester*, 412 U.S. 755 (1973)	10, 13
Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976)	10, 18

Constitutions, statutes, and rule:

U.S. Const.:	
Amend. XIV	2
Amend. XV	2
Ariz. Const. art. 5, § 1.B (Supp. 1989)	8
Ark. Const. of 1874, amend. 29, § 5 (1938)	2, 8
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
§ 2, 42 U.S.C. 1973	2, 5, 7, 8, 9, 11, 12, 13, 14, 18
§ 2(a), 42 U.S.C. 1973(a)	11
§ 2(b), 42 U.S.C. 1973(b)	15
§ 5, 42 U.S.C. 1973c	9, 11, 12, 13
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131	7-8

Constitutions, statutes, and rule—Continued: Page

Ala. Code (Supp. 1990):
§ 17-16-6 8
§ 17-16-35 8
Ark. Stat. Ann. (1976):
§§ 3-110 to 3-113 8
§ 3-113 (Supp. 1985) 8
§ 3-113(c) 8
§ 3-113(d) 8
§ 3-113(i) 8
Ark. Stat. Ann. (1987):
§ 7-5-106 ..... 2, 3
§ 7-5-106 (Supp. 1989) 2
§ 7-7-202 ..... 2, 8
§ 7-7-203 (Supp. 1989) 2
Fla. Stat. Ann. (Supp. 1990):
§ 100.061 8
§ 100.091 8
Ga. Code Ann. § 21-2-501 (1987) 8
La. Rev. Stat. (1979):
§ 18:402 (Supp. 1990) 8
§ 18:481 8
Miss. Code Ann. § 3109 (Supp. 1989) 8
N.C. Gen. Stat. § 163-111 (Supp. 1990) 8
Okla. Stat. Ann. tit. 26 (Supp. 1990):
§ 1-102 8
§ 1-103 8
S.C. Code Ann. § 7-13-50 (Law. Co-op. Supp. 1989) 8
Tex. Code Ann. § 13.003 (Vernon Supp. 1990) 8
Sup. Ct. R. 14.1(a) 19

Miscellaneous:

121 Cong. Rec. 16,251 (1975) 12
H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) 12
H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 12-13
S. Rep. No. 295, 94th Cong., 1st Sess. (1975) 12
S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 3, 12, 17

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Phillips County is a predominantly rural, economically depressed county in Arkansas. According to the 1980 census, the County has a total population of 34,772 residents of whom 53% are black. Pet. App. 6a n.1. Blacks constitute 47% of the County's voting age population. *Ibid.*

All six countywide elective offices [1] are filled through partisan elections. No black candidate has ever been nominated for countywide office by either the Democratic

[1] These offices are sheriff, judge, treasurer, assessor, county clerk, and circuit clerk (JX 1, at 20).

or Republican Party. Pet. App. 125a. Nor has any black candidate won countywide office. *Ibid.*

Under a 1939 amendment to the Arkansas Constitution (Pet. App. 66a), a party nominee must receive a "majority of all the votes cast for candidates for the office in a primary election." Ark. Const. of 1874, amend. 29, § 5 (1938). See Pet. App. 7a-8a. Under the state statute designed to implement this provision, the primary process consists of a "preferential" primary election and, if necessary, a runoff "general primary" election. Ark. Stat. Ann. § 7-7-202 (1987). The preferential primary is held two weeks before the general primary. Ark. Stat. Ann. § 7-7-203 (Supp. 1989).

In 1983, the Arkansas Legislature also enacted a runoff requirement for general elections for municipal and county offices. Ark. Stat. Ann. § 7-5-106 (1987). Municipal offices in Phillips County are filled through nonpartisan elections. There is no primary election as such, and a runoff is often required because the participation of multiple candidates tends to prevent any one candidate from obtaining a majority in the first balloting. See Pet. App. 138a.

2. In 1986, petitioners—describing themselves as black residents of Phillips County registered to vote in general elections and Democratic primaries (Amended Compl. 2-3)—filed suit in the United States District Court for the Eastern District of Arkansas, seeking declaratory and injunctive relief to prevent the operation in Phillips County of Ark. Stat. Ann. § 7-7-202 (1987) (party primary runoff) and § 7-5-106 (Supp. 1989) (general election runoff). Petitioners alleged that the runoff requirements mandated by these statutes were adopted with a discriminatory purpose in violation of the Fourteenth and Fifteenth Amendments, and that they operated in Phillips County to deny black residents an equal opportunity to elect the candidates of their choice in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

Prior to trial, the district court dismissed petitioners' challenge to the general election runoff requirement on two alternative grounds. Pet. App. 143a. First, the court held that petitioners lacked standing to challenge the statute, because they failed to demonstrate that the general election runoff requirement had harmed any black candidates. *Id.* at 164a; see *id.* at 152a, 164a-167a. Second, the court found that petitioners had failed to perfect this aspect of their suit against the proper parties.[2]

Following trial on the party primary issue, the district court addressed the so-called "Senate Report factors."[3] Pet. App. 83a-130a. The court found that the black population of Phillips County constituted "approximately 53% of the total, and the voting age population of blacks is only marginally less than that of the whites." *Id.* at 105a.[4] The court then observed that "there has been extreme racial polarization in voting in Phillips County, Arkansas, in recent years," *id.* at 115a,[5] and found that

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[2] The court held that the Phillips County Election Commission was an indispensible party to the challenge to Section 7-5-106, and that petitioners had failed properly to join the Commission, because of a defect in service. See Pet. App. 132a, 143a. The court also dismissed the Governor and Secretary of State as defendants, on the ground that "no claim of wrongdoing ha[d] appropriately been asserted against [them]." *Id.* at 155a. The court reasoned that if the defendant county committees were required by the Voting Rights Act to certify certain results, the Governor and Secretary of State would have no choice but to accept those results. *Ibid.*

[3] These are the factors identified in the Senate Report accompanying the 1982 amendment to Section 2 of the Voting Rights Act. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). See *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986).

[4] The court did not cite a figure for voting age population, but the undisputed evidence showed that 47% of the voting age population was black. See Pet. App. 21a.

[5] The court based this conclusion on evidence offered by petitioners concerning 15 elections held in Phillips County in 1984 and 1986 in which black candidates had unsuccessfully sought election to

Arkansas has had a long history of official discrimination that has affected the right of black citizens to register, vote, and otherwise participate in the democratic process. *Id.* at 114a-115a. In addition, the court found that black residents continued to bear the effects of discrimination in areas such as education, employment, and health, which "are more devastating in Phillips County than in other places because of * * * dire economic circumstances." *Id.* at 119a. The court observed, however, that "those effects should not hinder [blacks'] ability to participate effectively and equally in the political process." *Ibid.* The court further found that "race has frequently dominated over qualifications and issues" in elections, *id.* at 125a, and that no black candidate had ever been elected to countywide or state legislative office from Phillips County. *Ibid.*[6]

With regard to the state and party policies underlying the primary runoff requirement, the court concluded that they were "not tenuous but, to the contrary, strong, laudable, reasonable, and fair to all." Pet. App. 130a. Observing that "[m]ajority rule" lies at "the very heart of our political system," the court stated that "it must be assumed" that the State had adopted the primary runoff requirement to vindicate that legitimate purpose. *Id.* at 127a-128a. The court also expressed the conviction that "the elimination of the run-off would tend to perpetuate racial polarization and bloc-voting." *Id.* at 129a. The court added (*ibid.*):

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countywide office, city office, or state legislative seats within Phillips County. See Pet. App. 116a-117a. Petitioners' expert witness estimated that black candidates received between 86% and 100% of the black votes cast in the elections for countywide office, but no more than 15%—and usually much less—of the white votes. *Ibid.*

[6] The court noted that there was little evidence on the responsiveness of elected officials (Pet. App. 126a) or on the slating process. *Id.* at 118a. It concluded that the County has not, "in the recent past, used any of the other 'discrimination-enhancing' voting practices mentioned [in the Senate Report]." *Ibid.*

> Each party has an objective of breaking down harmful divisions among its supporters. The evidence suggests that plurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built.

The court then dismissed petitioners' Section 2 challenge to the operation of the majority vote requirement for party primaries in Phillips County.[7] The court explained that "we do not have here the minimal disparities necessary to establish either whites or blacks as a 'minority' of the voting age population. Those populations are for practical purposes equal." Pet. App. 92a. The court thus ruled that "as a matter of law, * * * the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of Section 2." *Id.* at 107a-108a.

Although noting that it was not adopting the view that "section 2 does not apply to majority vote requirements when the election at issue is for a single office," Pet. App. 104a-105a, the court went on to state that it had doubts "that runoff requirements have any identifiable racially discriminatory effects" (*id.* at 97a), or "in the factual context revealed by the evidence, could, as a matter of law, be deemed to be a device capable of making the political processes leading to nomination less open to participation by blacks than to others." *Id.* at 105a. The court noted that the prospects for black candidates obtaining the party nomination under the single primary system that petitioners seek were "speculat[ive]" (*id.*

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[7] The court also dismissed petitioners' constitutional claims after finding that petitioners' evidence was insufficient to establish that the primary runoff requirement was enacted and maintained with a racially discriminatory purpose. Pet. App. 82a. Petitioners do not seek review of that dismissal.

at 100a), because "once you change the rules, then a different dynamic obtains." *Id.* at 98a.[8]

On the other hand, the court emphasized the importance of the state interests at issue. The court quoted from commentators' views that eliminating majority vote requirements would weaken political parties' chances of nominating winning candidates, making it impossible to predict whether adoption of a plurality vote system would lead to the election of more black officials. Pet. App. 94a-95a, 100a-101a. The court further suggested that retaining the majority vote requirement would probably foster biracial coalition-building over time, and thus could be expected to enhance black political influence in the long run. *Id.* at 101a-104a, 128a-129a. Finally, the court suggested that invalidating majority vote requirements would undermine the operation of democratic systems of representation because "Americans have traditionally been schooled in the notion of majority rule. * * * [A] majority vote gives validation and credibility and invites acceptance; a plurality vote tends to lead to a lack of acceptance and instability." *Id.* at 81a.

The court discounted what it recognized were its "positive findings with respect to many of [the Senate Re-

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[8] The court explained (Pet. App. 97a-98a):

> It is one thing for the [petitioners], Mr. and Mrs. Whitfield, to point out that, after their first primary elections, they would have been the Democratic Party's candidates in the general election if they had not had to face a runoff; it is quite another thing to state that, had there been no runoff provisions when they ran in the primary, they would have been the Democratic candidates for the particular offices they were seeking.

The court observed that "where racial voting and racial polarization exist," the establishment of a plurality election system "will result in attempts to limit the number of candidates on one's own side and, at the same time, to attempt to increase the number of candidates on the opposition side." The success of black or white candidates would therefore turn on the "happenstance" of whether "the black community can agree on one candidate * * * while the white community does not respond in kind and therefore ends up with two or more white candidates in the race." *Id.* at 98a.

port] factors." Pet. App. 130a. It stated that these factors had "no tendency to prove, or disprove" a claim that the Arkansas majority vote requirement for party primaries "makes the political processes not 'equally open to participation' by blacks in that blacks have 'less opportunity than whites to participate in the political process and to elect representatives of their choice.'" *Ibid.*; see also *id.* at 111a. In the court's view, "[t]he truth is that focusing on some of the factors serves more as a distraction than as a useful tool for evaluating the cause and effect operation of the challenged runoff laws." Pet. App. 130a.

3. On appeal, a panel of the Eighth Circuit, with Senior District Judge Hanson concurring in the result and Senior Circuit Judge Bright dissenting, reversed. Pet. App. 3a-42a.[9] In the lead opinion by Judge Beam, the court observed that the potential of majority vote rules to dilute minority voting strength was well recognized in the case law. *Id.* at 18a-19a. The court also decided that the district court had erred as a matter of law in ruling that a Section 2 claim could not be sustained where blacks made up 47% of the voting age population. Pet. App. 20a-21a. Finally, the court held that the district court failed properly to analyze the runoff requirement "in light of the results-oriented test articulated in the Senate Report" accompanying the 1982

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[9] Senior District Judge Hanson wrote separately (Pet. App. 43a-46a) to express concern over the "fragmentation of state law" that would result from enjoining operation of the majority vote statute in one county. *Id.* at 43a. He concluded, however, that Congress must have intended this "natural consequence" of its amendment to Section 2 of the Act. *Id.* at 44a-45a.

Senior Circuit Judge Bright dissented (Pet. App. 46a-57a) from the holding that the majority vote requirement for party primaries operated in Phillips County to violate the Voting Rights Act. Judge Bright argued that the importance of the principle of majority rule, its long history, and the absence of direct authority for the position adopted in the panel opinion, counseled against invalidation of the requirement of a majority vote for party nomination. *Id.* at 48a.

amendment to Section 2. Pet. App. 23a. The court concluded that petitioners' evidence on the factors deemed relevant by this Court in *Gingles* to a finding of vote dilution sufficed to establish a Section 2 violation under the totality of the circumstances. It remanded the case to the district court for determination of a remedy. *Id.* at 36a-37a, 42a.[10]

On rehearing en banc, the court of appeals affirmed the judgment of the district court by an equally divided vote, without opinion. Pet. App. 2a.

DISCUSSION

The questions whether Section 2 challenges to majority vote requirements can be maintained, and how they should be assessed, are important to the enforcement of the Voting Rights Act by the United States. There are majority vote or substantial plurality requirements for state offices in eleven States[11] and for offices in numerous localities. The United States is currently challenging certain applications of the majority vote requirement under Section 2 of the Voting Rights Act, and regularly evaluates the

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[10] The panel upheld the district court's dismissal of petitioners' constitutional challenges to § 7-7-202 and amendment 29 of the Arkansas Constitution, agreeing with the district court's findings that they had not been enacted with discriminatory intent. See Pet. App. 13a-15a.

The court of appeals also upheld the dismissal of petitioners' challenge to the majority vote statute for general elections. The court concluded that petitioners lacked standing. Pet. App. 38a n.4.

[11] See generally Ala. Code §§ 17-16-6, 17-16-35 (Supp. 1990); Ark. Stat. Ann. §§ 3-110 to 3-113, 3-113(i), 3-113(c), 3-113(d) (1976); Ariz. Const. art. 5 § 1.B (Supp. 1989); Fla. Stat. Ann. §§ 100.061, 100.091 (Supp. 1990); Ga. Code Ann. § 21-2-501 (1987); La. Rev. Stat. § 18:402 (Supp. 1990), § 18:481 (1979); Miss. Code Ann. § 3109 (Supp. 1989); N.C. Gen. Stat. § 163-111 (Supp. 1990); Okla. Stat. Ann. tit. 26, §§ 1-102, 1-103 (Supp. 1990); S.C. Code Ann. § 7-13-50 (Law. Co-op. Supp. 1989); Tex. Code Ann. § 13.003 (Vernon Supp. 1990).

effect of such requirements in reviewing changes submitted for preclearance under Section 5, 42 U.S.C. 1973c.

These questions, however, have received limited consideration by the lower courts, and, as yet, have not generated substantial disagreement among the circuits.[12] In addition, the inability of the en banc court of appeals to issue an opinion in this case counsels against review by this Court. While we think the district court erred in its standing analysis, and while we do not share that court's expressed reservations about the applicability of Section 2 to the majority vote requirement at issue here, the district court, in the final analysis, did address petitioners' Section 2 claim on the merits under the totality of the circumstances test. That is the correct legal test; the question whether the district court properly applied that test to the facts before it—a matter as to which we have significant doubts—does not warrant further review in this Court.

We anticipate that the question of the validity under Section 2 of particular majority vote requirements will arise in future cases. Given the present lack of a circuit conflict, the fact that most circuits have not addressed

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[12] Only the Second Circuit has ruled on whether the operation of a party primary runoff requirement for single member offices violates the Voting Rights Act. In *Butts* v. *City of New York*, 779 F.2d 141 (1985), the Second Circuit considered a challenge to a New York statute requiring a run-off election in the party primary for city-wide office if no party candidate received more than 40% of the vote. In deciding that there was no Voting Rights violation, a divided panel of that court ruled that a majority vote requirement in a primary for candidates for single-member offices was not "the kind of electoral arrangement[] that can violate the Act." 779 F.2d at 148. The majority distinguished the case of "elections for multi-member bodies" by explaining that (*ibid.*)

> [t]here can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

the issue at all, and the fact that the only precedential opinion in this case is that of the district court—which applied the correct test—we believe that the issue will benefit from "further study" in the lower courts "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.). Accordingly, the petition should be denied.

1. As its first alternative ground of decision, the district court held that "the undisputed population figures here are not such as will permit [petitioners] to challenge [the state law]." Pet. App. 107a-108a. Under well-settled precedent, the district court was wrong to hold that black voters were too numerous in Phillips County to maintain a Section 2 challenge to the majority vote requirement. See Pet. App. 105a. In its seminal opinion outlining standards for analyzing vote dilution claims, the Fifth Circuit sitting en banc conclusively rejected the analytical approach employed by the district court here. See *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). The *Zimmer* court reversed district court and panel rulings that an at-large voting system could not be said to cause vote dilution where the total black population was 58.7%, but blacks constituted a minority of registered voters. 485 F.2d at 1300-1301. The court in *Zimmer* noted that this Court upheld a finding of vote dilution in *White* v. *Regester*, 412 U.S. 755 (1973), even though the protected group in that case (Mexican-Americans) comprised a numerical majority in one of the counties at issue. 485 F.2d at 1303. Reasoning from this Court's precedents, the Fifth Circuit concluded that "access to the political process and not population [is] the barometer of dilution of minority voting strength." *Ibid.*

In this case, the undisputed figures show that blacks constitute a *minority*—47%—of the voting age population. Pet. App. 6a n.1, 21a. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980) (voting age

population generally recognized as most appropriate indicator of minority voting strength). Moreover, where past discrimination and adverse social conditions affect access to the political process, even a black voting majority might not have an equal opportunity to elect candidates of its choice, and it is that opportunity—not any numerical test—that is the touchstone under the Act. See 42 U.S.C. 1973.

The district court, however, did not rest on its ruling that petitioners could not mount a Section 2 challenge because of the population figures, but instead went on to consider the merits of petitioners' challenge.

2. a. The district court's doubts about whether a majority vote requirement can ever violate Section 2 of the Voting Rights Act run contrary to the plain language of the statute, which provides without limitation that "[n]o voting qualifiation or prerequisite to voting or standard, practice, or procedure" shall be imposed or applied in a manner that violates the Act. 42 U.S.C. 1973(a). As this Court observed in *Gingles*, 478 U.S. at 43, Section 2 prohibits "*any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities." The statutory language makes no exception for majority vote requirements, either for single member offices or other types of elected positions. This Court has construed identical language in Section 5 of the Voting Rights Act—which covers changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c—to apply to majority vote requirements. See *City of Rome* v. *United States*, 446 U.S. at 184.[13]

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[13] The Attorney General, in the exercise of his preclearance responsibilities under Section 5, has frequently objected to changes replacing a plurality-win rule with a majority vote requirement, and Congress was well aware of this longstanding administrative interpretation when it amended Section 2 in 1982. The Attorney

Section 2 goes on to provide that a violation is established if, "based on the totality of circumstances," it can be demonstrated that a "political process[] leading to nomination or election" operates to deprive protected minorities of equal opportunity to "participate in the political process and to elect representatives of their choice." Once again, the statute does not categorically limit the types of "political processes" that might be challenged as preventing minorities from electing "representatives of their choice." The words simply contain no exception for majority vote requirements.[14] And there is no theoretical

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General's administrative interpretation comports with the legislative history of Section 5. In extending Section 5 of the Voting Rights Act to Texas in 1975, Congress focused specifically on the extensive use in that State of majority vote requirements, coupled with other dilutive election devices, to halt the growing political influence of Mexican-American and black voters. See, *e.g.*, S. Rep. No. 295, 94th Cong., 1st Sess. 27 (1975) (describing amendment of city charter to replace plurality-win rule with majority run-off system after black almost won election, and noting extensive use of at-large structures with accompanying majority run-offs in largest Texas cities); H.R. Rep. No. 196, 94th Cong., 1st Sess. 18-20 (1975) (same); 121 Cong. Rec. 16,251 (1975) (remarks of Rep. Edwards).

[14] Nor does the legislative history give any indication that Congress intended to provide such an exception. To the contrary, that history suggests that Congress regarded majority vote rules as an electoral device having the potential to dilute the minority vote. See, *e.g.*, S. Rep. No. 417, *supra*, at 6 (listing "majority runoffs" as one of "a broad array of dilution schemes * * * employed to cancel the impact of the new black vote"); *id.* at 10 (frequency of Section 5 objections to majority vote requirements "reflects the fact that * * * covered jurisdictions have substantially moved * * * to more sophisticated devices that dilute minority voting strength"); *id.* at 22, 29, 30 (listing the presence of a majority vote requirement as a factor to be considered under the totality of the circumstances test in light of its potential to enhance discrimination); *id.* at 30 (although prior case law dealt with "electoral system features such as at-large elections, majority vote requirements and districting plans * * * Section 2 remains the major statutory prohibition of all voting rights discrimination"). See also H.R. Rep. No. 227, 97th

or empirical reason why a majority vote requirement cannot operate—under certain circumstances—to afford a protected class less opportunity to participate in the electoral process or to elect its chosen candidate.

Nothing in this Court's decisions precludes a finding that a majority vote rule, under the totality of the circumstances, may operate to dilute the vote of a protected class in violation of Section 2. In *White* v. *Regester*, *supra*—a case considering the constitutionality of a multimember districting scheme that the district court found was used invidiously to dilute minority voting strength —this Court found "no reason to disturb" a district court's findings that a majority vote prerequisite to nomination in primary elections "enhanced the opportunity for racial discrimination." 412 U.S. at 766. In *City of Port Arthur* v. *United States*, 459 U.S. 159 (1982), in considering a Section 5 challenge to the expansion of the City's borders that resulted in decreased minority voting strength, the Court upheld the district court's elimination of the majority vote requirement for certain at-large positions on the city council. The Court observed that "[i]n the context of racial bloc voting prevalent in [the municipality], the [majority vote] rule would permanently foreclose a black candidate from being elected to an at-large seat. Removal of this requirement, on the other hand, might enhance the chances of blacks to be elected to the two at-large seats." *Id.* at 167-168. Finally, in *City of Rome* v. *United States*, *supra*—another Section 5 case—the Court acknowledged that a general election majority vote requirement, in combination with extreme racial bloc voting, "significantly decreased the opportunity for * * * a Negro candidate since, 'even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority,

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Cong., 1st Sess. 18 (1981) (potentially discriminatory elements of election process include "majority vote run-off requirements").

[he] would be at a severe disadvantage.' " 446 U.S. at 184 (quoting 472 F. Supp. 221, 244 (D.D.C. 1979)). All of these statements belie the district court's suggestion that a majority vote requirement is not an electoral arrangement that can result in minority vote dilution in violation of the Act.

b. In *Thornburg* v. *Gingles*, 478 U.S. at 46-47 n.12, this Court established an analytic framework for determining whether a particular voting practice can operate to deprive a protected class of rights under Section 2. While the Court took care to note that it was not deciding whether the standards developed in that case for assessing whether multimember districts violated Section 2 applied to challenges to other electoral arrangements, we believe that those standards are applicable in the present context.

According to *Gingles*, the challenged practice generally must satisfy three "necessary preconditions." 478 U.S. at 48-51. Petitioners have plainly satisfied two of the *Gingles* preconditions—proof of polarized voting, including substantial minority cohesion, and white bloc voting against minority-preferred candidates denying electoral success to those candidates. See *id.* at 48-49 n.15, 51. The level of political cohesiveness among black voters in countywide elections in Phillips County is at least as high as that which this Court described as "overwhelming" in *Gingles*, *id.* at 59. Likewise, the degree of white bloc voting against minority candidates in elections for countywide office is significantly greater than that observed in *Gingles*, compare *id.* at 80-81 with Pet. App. 116a-117a, and is sufficient to result consistently in the defeat of black candidates for nomination under the runoff system. In addition, black candidates have never won party nomination to countywide office. Black voters, although constituting 47% of the voting age population, have so far been unable to elect the candidates of their choice.

To satisfy the remaining *Gingles* precondition, plaintiffs must establish that minority voters would have an

enhanced "potential to elect representatives in the absence of the challenged structure or practice." 478 U.S. at 50 n.17. To challenge a majority vote requirement for party primaries, however, plaintiffs need not show a potential to elect; they need only show the potential to *nominate* candidates of their choice in a system that does not employ such a rule. The statutory language explicitly provides that a violation is established if, *inter alia*, "the political processes leading to *nomination* * * * are not equally open to participation by members of a class of citizens protected by" the Act. 42 U.S.C. 1973(b) (emphasis added). Thus, in order to show an injury capable of redress under the Act, plaintiffs must establish only that success is possible at the stage of the political process under challenge.[15]

The Court in *Gingles*, 478 U.S. at 50 & n.17, also indicated that the potential for success may be established in theory; it is not necessary to demonstrate, for example, that particular minority-supported candidates would have won specific past elections if the challenged practice had not been in place, nor that minority-supported candidates are sure to win in the future. Although petitioners in this case cannot prove that candidates supported by black voters are *certain* to do better under a plurality-win nomination system, they can demonstrate that, even at the extreme levels of racial bloc voting in Phillips County, those candidates have at least the potential to gain nomination if the majority vote requirement is abolished. For example, because blacks constitute more than one-third of the voting age population, a minority supported candidate might be able to win the nomination if two non-minority-backed candidates run against the

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[15] In dismissing petitioners' claim with regard to the nomination process, the district court therefore erred to the extent that it relied on petitioners' failure to establish that minority-backed candidates could win the general election if they succeeded in gaining nomination in the primaries. See Pet. App. 94a-95a, 100a-101a.

minority's candidate; the same would not be true if a runoff took place.

The district court therefore erred in concluding that petitioners' claims of redressable injury were too speculative because candidates supported by non-minorities might refrain from running against each other to minimize minority success under a plurality-win system. This reasoning is contrary to the approach in *Gingles*, which does not require petitioners to show that they *will* succeed in winning nomination under every possible scenario. Rather, the relevant question is whether, if the challenged practice is eliminated, it is possible for minority supported candidates to succeed.

c. After the three-part threshold test is satisfied, the *Gingles* framework calls for an assessment under the "'totality of the circumstances" of the effect of the practice in a particular locale on the opportunity of protected groups to "participate in the political process and to elect representatives of their choice." This assessment is based on a consideration of all relevant factors appropriately tailored to take into account the nature of the challenged practice. In considering the effect of these factors on minority voting strength, the court must engage in a "searching practical evaluation of the 'past and present reality,'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 417, *supra*, at 30).

The district court, "assuming Section 2 would apply to runoffs" under the circumstances before it, concluded that "the proof does not sustain [petitioners'] contention that the challenged provisions result in [petitioners] and other blacks having less opportunity to participate in the political process or to elect candidates of their choice." Pet. App. 131a. The court ruled that petitioners "have not proved or demonstrated by the evidence that [the majority vote] provision, based on the totality of the circumstances revealed by the evidence in this case, has had, or has, the effect of discriminating against blacks or that there is any causal connection between the lack of black

electoral success and the challenged runoff procedure." *Id.* at 108a.

We have serious doubts that the district court correctly applied the totality of the circumstances test. For example, the district court seemed to ascribe nearly controlling weight to the "underlying policy" factor under the totality of the circumstances. Cf. *Gingles*, 478 U.S. at 45. The district court characterized the "majority win" principle as a fundamental tenet of democratic systems, and suggested that departure from that principle invites "lack of acceptance and instability." See Pet. App. 80a-81a; see also *id.* at 48a (court of appeals opinion of Bright, J., dissenting in part); *Butts*, 779 F.2d at 149. Majority vote requirements at the nomination stage have also been justified as a means to avoid the "fluke" election of candidates far from the political mainstream, see *id.* at 143, or as a way for political parties to maximize the appeal of their nominee to the general electorate. See Pet. App. 100a-101a.

A majority vote rule at the party primary level may well be advantageous to the party and tend to promote stability in the democratic process. However, the district court's characterization of the majority vote requirement as a fundamental democratic tenet is overdrawn in this context. Plurality-win primaries for state and local offices are widespread, and represent the predominant system in state governments nationwide. The common and longstanding use of this arrangement negates the premise that a majority vote rule at the primary stage is an indispensable component of our democratic system.[16]

Thus, while we fully agree that legitimate reasons exist for adopting a majority vote system—either at the primary or the general election phase—and that those

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[16] Cf. S. Rep. No. 417, *supra*, at 29 n.117 ("even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process").

reasons should be properly weighed under the totality of the circumstances, those reasons do not trump all other factors or combination of circumstances to render the practice automatically valid under Section 2. The use of multimember districts, for example, may advance legitimate goals, see, *e.g.*, *Zimmer* v. *McKeithen*, 485 F.2d at 1301 (at-large scheme insures fidelity to one-person, one-vote principle), but multimember districts may nonetheless operate to violate Section 2. There is no reason for a different approach to the majority vote rule: the statutory language and legislative history of Section 2 make clear that Congress did not intend to provide an exemption for majority vote requirements simply because good things could be said for them.

At the same time it was according nearly controlling weight to the sound policies underlying the challenged practice, the district court minimized the significance of what it acknowledged were "positive findings with respect to many of [the Senate Report] factors." Pet. App. 130a. The court should not have so readily dismissed its findings that "race has frequently dominated over qualifications and issues" in elections (*id.* at 125a), that there is a long history of official discrimination in voting (*id.* at 114a-115a), that Phillips County is characterized by extreme racial bloc voting (*id.* at 116a-117a), and that black residents of Phillips County suffer from a legacy of racial discrimination. *Id.* at 119a, 123a. Rather, all those factors should have been considered—together with the policy underlying the challenged law—in a more "searching practical evaluation" of the sort mandated by this Court in *Gingles*. 478 U.S. at 45.

3. The district court dismissed petitioners' challenge to the *general* election majority vote requirement on two alternative grounds: failure to join an indispensable party, and lack of standing or ripeness. Although petitioners seek review of the first ground (see Pet. ii), it is

plainly fact-specific—relating to a defect in service of process (Pet. App. 143a-144a)—and does not warrant review by this Court. Petitioners do not include a "question presented" on the second ground, the standing or ripeness issue. See Sup. Ct. R. 14.1(a).[17] This is a further reason to deny review, since the two grounds are alternative bases for the district court's decision.[18]

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[17] Petitioners state in a footnote to the text of their petition that this "alternative ground for dismissal * * * squarely conflicts with congressional intent, *Gingles* and decisions of other circuits." Pet. 48 n.20.

[18] In our view, the district court erred in dismissing petitioners' challenge to the general election majority vote requirement for lack of standing or "ripeness." Pet. App. 143a, 163a-167a. Petitioners have standing as black citizens who reside in Phillips County and are registered to vote in general elections. See Amended Compl. 2-3; see also Pet. App. 161a-162a. Therefore, the fact that there were no minority candidates who would have won in the absence of a majority vote requirement is not an automatic bar to standing. See, *e.g.*, *Gingles*, 478 U.S. at 57 n.25 (recognizing that minority group may "have never been able to sponsor a candidate"); *Westwego Citizens for Better Gov't* v. *Westwego*, 872 F.2d 1201, 1208-1209 (5th Cir. 1989) (plaintiffs not precluded from challenging elections for office where no black candidate had run).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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